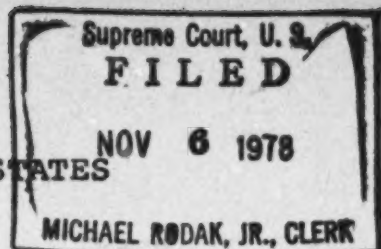


IN THE  
SUPREME COURT OF THE UNITED STATES

December Term, 1978



No. **78-859**

ARTHUR V. GRASECK, JR.,  
Plaintiff-Petitioner,

-against-

~~ANGELO MAUCERI, Individually and as Administrative Judge of the District Court of Suffolk County; EDWARD U. GREEN, JR., Individually and as a Judge of the District Court of Suffolk County,~~  
Defendants,

JOHN F. MIDDLEMISS, JR., Individually and as Attorney-in-Charge, Legal Aid Society of Suffolk County, New York,  
Defendant-Respondent,

~~RALPH COSTELLO, Individually and as Attorney-in-Charge of the District Court Bureau of the Criminal Division of the Legal Aid Society of Suffolk County, New York,~~  
Defendant,

LEGAL AID SOCIETY of Suffolk County, New York,  
Defendant-Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

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Defendant,

LEGAL AID SOCIETY of Suffolk County, New York,  
Defendant-Respondent.

---

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Arthur V. Graseck, Jr., prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit filed and entered August 7, 1978<sup>1/</sup> (unreported) (Pet. App. A, pp. 1-38) affirming a judgment of the United States District Court for the Eastern District of New York (The Honorable Jacob Mishler, Ch. J.) filed October 31, 1977 (unreported) (Pet. App. B, pp. 1-55) dismissing petitioner's complaint, alleging petitioner's improper firing by the respondents as an attorney for the Legal Aid Society of Suffolk County, against John

<sup>1/</sup>  
The Appendices are separately presented in a companion volume and cited as "Pet. App."

F. Middlemiss, Jr. and the Legal Aid Society of Suffolk County, New York.

#### OPINIONS BELOW

The opinion of the Court of Appeals appears in Pet. App. A., pp. 1-38 (unreported).

The opinion of the United States District Court for the Eastern District of New York appears in Pet. App. B., pp. 1-55 (unreported).

#### JURISDICTION

The United States Court of Appeals for the Second Circuit, on August 7, 1970, affirmed that portion of a dismissal of an action, brought under Title 42 U. S. C. 1983 and Title 28 U. S. C. 1343 (3), by the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, hold-

ing that appellees-respondents had not acted under color of state law and that therefore the Court lacked subject matter jurisdiction. The judgment of the Court of Appeals was entered on August 7, 1978. (Pet. App. C., pp. 1(a)-1(b))

The jurisdiction of this Court is sought to be invoked under Title 28 U. S. C. 1254 (1).

#### QUESTIONS PRESENTED

1. Whether the United States Court of Appeals correctly determined that respondents Middlemiss and Legal Aid Society did not engage in State action by dismissing petitioner even though the Court:

(a) failed to address the symbiotic nature of the relationship between Legal Aid and Suffolk County;

(b) did not consider the sig-

nificance of Legal Aid's status as virtually the sole source of legal representation for indigent criminal defendants in Suffolk County, a role it occupied as a result of being exclusively funded by the County;

(c) called for a higher degree of state involvement in this suit, than it otherwise would have required, on the presumption that this case did not involve allegations of racial discrimination, despite recent judicial criticism of preferential treatment based on an individual's status as a member of a racial minority; and

(d) in any event, ignored the racial implications of this suit.

2. Whether the failure of the Court of Appeals to find state action has re-

sulted in a violation of Sixth Amendment rights of indigent defendants in that it sanctioned the imposition of a penalty on petitioner for asserting remedies on behalf of poor criminal defendants which retained attorneys could have asserted for wealthy clients with impunity.

3. Whether the failure of the Court of Appeals to find state action infringes on the First Amendment rights of petitioner by sanctioning the imposition of a penalty for zealous representation of indigent clients, pursuant to the requirements of the Sixth Amendment and the Code of Professional Responsibility.

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

The First Amendment to the United States  
Constitution:

"Congress shall make no law ...

abridging the freedom of speech ...."

The Sixth Amendment to the United States  
Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the United

**States Constitution:**

" ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Title 42 United States Code, Section 1983:**

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress."

**Title 28 United States Code, Section 1343**

**(3):**

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ... (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.."

**New York County Law, Art. 18-B, Section 722 (McKinney Supp. 1977-78):**

"The governing body of each county ... shall place in operation throughout the county ... a plan for providing counsel to persons charged with a crime ... who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender ...

2. In criminal proceedings, representation by counsel furnished by a private legal aid bureau or society designated by the county ..., organized and operating to give legal assistance and representation to per-

sons charged with a crime within the ... county who are financially unable to obtain counsel ...

3. Representation by counsel furnished pursuant to a plan of a bar association ...

4. Representation according to a plan containing a combination of any of the foregoing ..."

#### STATEMENT OF THE CASE

Petitioner challenges his sudden summary dismissal from the Legal Aid Society of Suffolk County, without notice, as a submission to judicial pressure to have him removed. Review is sought of the judgment of the Court of Appeals which sanctioned that dismissal, rejecting contentions that it resulted in infringement of petitioner's and his

clients' constitutionally protected rights under the First and Sixth Amendments, respectively, and was violative of the due process clause of the Fourteenth Amendment.

This case concerns the policy question of whether respondent Society, and other such organizations, play an appropriate role in their dealings with indigent clients. The circumstances surrounding petitioner's discharge, which was an immediate response to judicial intervention, raise a question about a gross disparity between legal services provided the poor and the wealthy. It appears that an attorney is expected to be zealous on behalf of retained clients, but a mere agent of the judiciary in his dealings with powerless defendants, who do not pro-

vide his compensation.

Petitioner's dismissal was accomplished in response to confrontations between him and Judges Angelo Mauceri and Edward U. Green, Jr. of the District Court of Suffolk County. These encounters had resulted in petitioner's exclusion from Judge Green's chambers and courtroom and from the prisoners' detention area of the District Court, as detailed more fully below.

Neither prior to nor in the aftermath of his summary dismissal was petitioner accorded due process safeguards which would be available to private counsel who incurred the wrath of Judges and might face Bar Association grievance committee proceedings. It is clear that such a professional body would reach a

determination only after the criticized conduct was thoroughly and fairly evaluated. Indeed, in the latter situation, the private counsel, even if he were found to have engaged in improper conduct, most probably would be penalized in a manner less severe than the summary discharge imposed on petitioner, as a result of judicial intervention in the affairs of respondent Legal Aid. The resulting difference in pressures experienced by assigned and retained counsel has an inevitable effect on the quality of representation afforded the poor: whereas a private lawyer must see himself as primarily a representative of his client and an advocate of the latter's interests, a legal aid lawyer is virtually compelled to perceive his role as that of a repre-

sentative of the Court, who must focus on judicial concerns, even though the client may be adversely affected.

This suit was initially heard by Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York. A full trial was conducted during the week of November 22, 1976.

After hearing all of the evidence pertaining to state involvement in the operation of the Legal Aid respondents' motion to dismiss for lack of jurisdiction<sup>2/</sup> "...find-

2/

In reaching this decision, J. Weinstein declared:

"There's ample state action. All of the funds for this Legal Aid Society's activities come from the State. There's ample evidence that the Administrative Judge worked very closely with Legal Aid in resolving their problems, made applications for funds.

I don't see how there really could be any serious doubt on the facts that this is constitutionally state action.

(continued next page)

ing state action from the close working relationship between the District Court of Suffolk County and the Society."

(Pet. App. A, p. 26)

After denying respondents' motion, Judge Weinstein recused himself on December 27, 1976 at their request. Thereafter, the case was reassigned to Chief Judge Jacob Mishler who, on February 14, 1977, denied petitioner's request that the case be decided on the record compiled before Judge Weinstein.

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2/ cont'd

It's perfectly clear from the evidence in the case as well as from what is apparent on the basis of judicial notice that the District Court of Suffolk County could not have operated at all without the Legal Aid Society, and for purposes of this issue it seems to me that this must be considered state action." Trial Transcript at 269 (Weinstein trial) (November 26, 1976).

On May 31 and June 2, 1977, the matter was retried before Chief Judge Mishler.

Petitioner is a graduate of the Yale Law School (1963) who completed an L.L.M. degree in labor law at New York University Law School (1968) and has been admitted to practice in New York since 1964. He has been the recipient of such academic honors as membership in Phi Beta Kappa and selection as a Finalist in the Cardozo Moot Court Brief competition at Yale Law School.

He came to work for respondent Legal Aid, having had diverse experience as an associate with a private Manhattan law firm and a member of the staffs of public and quasi-public bodies. He was employed by the Legal Aid Society of Suffolk County from July, 1971 until October 13, 1972,

being assigned for most of that period at the Society's District Court Bureau in Hauppauge, Long Island. <sup>3/</sup>

It is undisputed that incompetence never served as a basis for petitioner's dismissal. <sup>4/</sup> Indeed, the testimony of his former Legal Aid supervisor, E. Thomas Boyle, Esq., was to the effect that Graseck was an exceptionally dedicated and talented attorney, whom others relied on to handle particularly difficult cases. <sup>5/</sup>

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<sup>3/</sup> See petitioner's resume at Addendum, pp. 9-11 -- pp. 284-85 of the 'Joint Appendix' prepared for the Court of Appeals. Hereinafter, figures preceded by A will refer to pages in the Joint Appendix.

<sup>4/</sup> A171.

<sup>5/</sup> The following exchange took place at the second trial between counsel and Boyle (A234):

"Q. You indicated that you assigned cer-  
(continued next page)

The other principal actors in this suit are: John F. Middlemiss, Jr. -- He has been at all times relevant, the Attorney-in-Charge of Suffolk Legal Aid. As head of Suffolk Legal Aid, he hired Graseck and, on October 13, 1972 fired him. The Society had received federal funds for

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<sup>5/</sup> cont'd.

tain cases to Mr. Graseck to follow through, from start to finish; did those cases involve any particular subject matter?

A. Very often they would involve charges, misdemeanor assault cases, violations of harassment where the defendant's position was that the police had actually been the aggriever, and that these were simply charges of resisting arrest, which is another type of charge. These were simply trumped up charges to cover up for beatings that the defendant received at the hands of the police, and they are very, very difficult cases to handle in the District Court. These are one of the types that I would refer to him to get involved in."

some of its activities, which support was withdrawn during Middlemiss' tenure as Attorney-in-Charge, because of dissatisfaction with Legal Aid's view of its role and the conclusion that Society attorneys created bitterness in the client community by failing to adequately serve the poor. The report of the Office of Economic Opportunity appearing in the Addendum, pp. 1-8, is discussed more fully below.

Suffolk Legal Aid -- The Legal Aid Society of Suffolk County is a membership corporation under contract with the County of Suffolk to represent indigent criminal defendants in accordance with the County's obligation pursuant to Section 722 of the County Law of New York State. Since its inception in 1965, the Criminal Division

has been funded exclusively by the legislature of Suffolk County (Pet. App. A, p. 22 ). The Society developed a close working relationship with the Suffolk County District Court, whereby Legal Aid was the beneficiary of numerous favors provided by the Administrative Judge of the District Court, who expected cooperation from respondent Middlemiss and his subordinates. One of the legal contentions raised by petitioner, and treated more fully infra, is the symbiotic relationship which existed between respondent Society and the County and its bearing on the state action issue.

Angelo Mauceri -- He is and was at all relevant times the duly appointed Administrative Judge of the District Court of Suffolk County, who was resentful of such

conduct by Legal Aid lawyers as moving to dismiss cases for failure to prosecute. Addendum, p. 31. It is now undisputed that with respect to the "pen incident" (discussed more fully below), Judge Mauceri issued an order barring petitioner from the courthouse detention cells and then communicated with defendant Middlemiss by telephone and in writing regarding the incident. Evidence has been presented showing that in that telephone conversation Judge Mauceri said to defendant Middlemiss, "You have got to get this guy [Graseck] out of my court." Pet. App. A, pp. 14, 36.

The next day Arthur Graseck was dismissed. Mauceri initially denied any recollection of any communications with Middlemiss about Graseck on the day before

the latter's sudden discharge without  
6/  
notice.

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6/ The following exchange between counsel and Mauceri occurred at the first trial (A139-40):

"Q. ... have you ever communicated with Middlemiss before about a Legal Aid lawyer [other than Graseck]?"

A. No. ...

Q. Judge Mauceri, you recall in your pre-trial deposition you told us you had no communication with Mr. Middlemiss concerning the October 12 [pen] incident?

A. Yes, I recall that ...

Q. How was ... [your memory] refreshed?

A. With my own counsel.

Q. I don't want to intrude on the privacy of the information.

A. As long as I don't waive the privilege. He showed me the letter and that's how I remembered it.

Q. In addition to your letter do you remember now making a telephone call to Mr. Middlemiss that day?

(continued next page)

In addition on November 7 and 9, 1972, articles about plaintiff's dismissal appeared in Newsday, a Long Island newspaper, attributing to Judge Mauceri unflattering remarks about Graseck. (Addendum, pp.12-25)

Edward U. Green, Jr. -- He is and was at all relevant times a duly elected Judge of the District Court of Suffolk County. It is undisputed that on or about October 10, 1972, Judge Green learned that petitioner had filed an affirmation in support of a motion relating to the case of People v. McElhiney which affirmation was in part critical of Judge Green's conduct of the

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6/ cont'd.

A. Yes, just about the same time.

Q. You thought it was necessary to notify Mr. Middlemiss both orally and in writing?

A. Yes.

case at an earlier stage. It is also uncontested that Judge Green became enraged over what had been set forth in the affirmation and summoned Graseck and his supervisor, at that time, Ralph Costello, into his chambers where he registered his displeasure.<sup>7/</sup>

It is petitioner's contention, as detailed more fully below, that, at this meeting, Judge Green declared that he would no longer be permitted in the Judge's chambers or courtroom. Pet. App., A, p. 11. Judge Green also reported the incident to Judge Mauceri.<sup>8/</sup> Three days later, petitioner was dismissed. Judge

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7/ A 156-59.

8/ A. 155.

Green has been the subject of a Special Grand Jury Report, of which the Court is requested to take judicial notice, as bearing on conduct similar to that which resulted in petitioner's discharge.<sup>9/</sup>

E. Thomas (Tom) Boyle -- He was Attorney-in-Charge of the District Court Bureau from about October, 1971 to about August, 1972 and functioned as Graseck's immediate supervisor. A graduate of the University of Virginia Law School, Boyle was employed by respondent Legal Aid from the Fall of

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<sup>9/</sup> Report of the Grand Jury ... County of Suffolk ... concerning:

"Misconduct, non-feasance or neglect in public office by a public servant as the basis for a recommendation of removal or disciplinary action..." Plaintiff's allegedly critical remarks concerning Judge Green in the "McElhiney Affirmation" pale in comparison with the alleged conduct of Judge Green which was criticized by the Grand Jury.

1967 until December 1, 1972, advancing from the position of staff attorney to that of First Assistant, with responsibility for the entire Criminal Division.

After learning of petitioner's dismissal, Boyle unsuccessfully sought to have Middlemiss reconsider his decision. Shortly thereafter, in October, 1972, Boyle tendered his resignation from Suffolk Legal Aid in protest over the basis on which petitioner was fired. His resignation letter, appearing in Addendum, pp.26-29,28, provided, in pertinent part:

"It is apparent from my investigation that Mr. Graseck was discharged for incurring "judicial disfavor".

The record demonstrates that petitioner was fired for undertaking certain actions pursuant to his obligations under

the Code of Professional Responsibility and the Sixth Amendment. Moreover, the chronology of events renders inescapable the conclusion that the dismissal decision was actually motivated by pressure from state judges--and was a result of respondent Middlemiss' overreaction to communications from the judiciary.

Although it is undisputed that petitioner's dismissal was not premised on any single incident or reason, the closeness in time of the so-called 'pen incident' and the filing of the McElhiney affirmation with the dismissal make it clear that they were the triggering events. While respondents have claimed that other incidents, remote in time, involving encounters with Judges Green and Mauceri and others, played a role in the decision

to fire petitioner, he was never warned that these occurrences might place his job in jeopardy.<sup>10/</sup> Instead, these incidents were belatedly resurrected at trial as a justification for petitioner's sudden dismissal, one day after Judge Mauceri wrote to and called respondent Middlemiss about the "pen incident".

A close examination of the two triggering incidents, which resulted in Graseck's discharge, reveals that the leadership of Legal Aid is more responsive to judicial pressure than to the needs of its clientele. It appears that the Society's County funding affects its view of what its role should be.

McElhiney Affirmation -- On or about

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<sup>10/</sup> A 88-89.

September 27, 1972, petitioner moved to dismiss for failure to prosecute the case of People v. McElhiney, a misdemeanor case pending in the District Court, with respect to which Judge Green played a significant role. In the affirmation it was pointed out that the case had been on the calendar on eight occasions, alleged that the prosecution's principal witness had repudicated his prior statement as coerced and false and that Judge Green had undertaken to speak for the Office of the District Attorney in offering an explanation for the prosecution's repeated lack of readiness for trial.<sup>11/</sup>

When the Judge learned of the affirmation, on October 10, 1972, he, in his

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<sup>11/</sup> See McElhiney Affirmation, A 273-77.

own words, "...was in a rage." Judge Green summoned petitioner and his immediate supervisor to his Chambers.<sup>12/</sup> The record supports petitioner's contention that the import of Judge Green's unrecorded remarks was that petitioner was thenceforth banned from the Judge's chambers and courtroom.<sup>13/</sup>

Although respondent Society argues that petitioner exercised poor judgment in filing this affirmation, that contention is rebutted by the eventual decision to grant the motion in support of which the McElhiney affirmation was filed, thereby relieving a Legal Aid client from the burden of a criminal

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<sup>12/</sup> A 158-59.

<sup>13/</sup> A 58.

charge which had been pending against him  
14/ for a substantial period. Moreover, the  
testimony of Middlemiss, at the first  
trial, reveals that he readily accepted  
Judge Green's point of view, admittedly  
formulated in a moment of "rage", without  
even being fully aware of the contents of  
15/ the affirmation.

Pen Incident -- It is undisputed that on  
October 12, 1972, following a trial in  
which petitioner appeared as defense coun-  
sel, he accompanied a defendant to the

14/

None of the substantive allegations  
in the McElhiney affirmation was contro-  
verted by the Assistant District Attorney  
in his answering affidavit. A 308-09.

15/

The following exchange between counsel  
and Middlemiss, at the first trial, indi-  
cates that respondent Society viewed itself  
as an adjunct of the Court (A106-108):

"Q. Mr. Middlemiss, precisely what is so  
dreadful about that affirmation?

detention area and began to discuss with  
him the summation scheduled for later  
that day; that conversation was inter-  
rupted when the Suffolk County Police  
Department asked all non-detainees to  
leave the area so that they could perform  
an administrative function, that Graseck  
then provided defendant with paper and a  
ball point pen so that he could make  
notes for possible use during the summa-

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15/ cont'd.

A. I think it's wrong to call a judge a  
constant agent of the District Attorney's  
office.

Q. Does that affirmation call Judge Green  
a constant agent of the District ...  
[Attorney's] office?

A. I just viewed this action on his part  
as just one more thing that he had done ...

Q. Let's stick to the ... [McElhiney] af-  
firmation ... Were you really concerned at  
the language that he used in that affirma-  
tion? (continued next page)

tion, that the police subsequently discovered the pen in the defendant's possession, that Judge Mauceri was notified and promptly issued an order barring petitioner indefinitely from the holding pen; and that Judge Mauceri telephoned Middlemiss to inform him of the step he had taken and followed up the call with a formal letter. Pet. App. A, p. 14.

What Judge Mauceri said in his tele-

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15/cont'd.

A. Yes.

Q. You really think it was a terrible thing to do?

A. Yes.

Q. You think it's incorrect for an attorney making a motion like that?

A. Yes, in that vein; yes.

Q. Is it possible, Mr. Middlemiss, what you were upset about was not the language but Judge Green's reaction to that language?

(continued next page)

phone call to Middlemiss on October 12 is in dispute, but Tom Boyle testified that Middlemiss quoted Mauceri as having said, "You have got to get this guy[Graseck] out of my court." (Pet. App. A, pp. 14, 36). It is noteworthy that the Judge, in his follow-up letter of October 12, clearly indicated that he anticipated that petitioner would be removed by declaring that he hoped a pen incident would not be

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15/ cont'd.

A. No, it is not.

Q. This time you were upset about the actual language and not what the judge did about it?

A. I wasn't interested in what the judge did, I was interested in what was in that affidavit. ...

Q. Did you investigate the factual basis of that affirmation before you fired Mr. Graseck to find out whether it was a justifiable motion?

A. Under no circumstances would I think

repeated by Graseck "at any other location".

(Addendum, p. 34)

It is undisputed that quite apart from Middlemiss' feelings about the propriety of petitioner's having left a pen with a detainee, the attorney in charge bottomed his dismissal decision on the fact that Judge Mauceri's order, barring petitioner from the holding pen, limited petitioner's ability to operate effectively in the arraignment part. (Pet.App.

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15/ cont'd.

that was justified in putting it in there. If he felt that Judge Green was a constant agent of the D.A.'s office he should have brought it to the proper authorities.

Q. You continue to insist that's what the affidavit says in the face of the literal wording of the affidavit?

A. Yes."

Cf. Affirmation A 273-77.

A, pp. 29, 34-36) Clearly, Legal Aid made no attempt to challenge the propriety of the drastic step taken by Judge Mauceri, even though the order was made at the behest of the Suffolk County Police Department -- an agency with questionable motives given the fact that Graseck had been previously involved in cases involving clients who alleged police misconduct -- including a matter in which a Trial Judge implicitly found merit to a claim that the police administered a beating in the District Court holding pen.

16/  
Indeed, Middlemiss testified, upon examination by Judge Weinstein, that he was unaware of any written rule preventing attorneys from giving pens to prison-

16/

A 51.

ers as a means of facilitating attorney-client communication. Nevertheless, he indicated that he felt the giving of the pen was a sufficiently serious act to warrant a dismissal.<sup>17/</sup> In commenting on Middlemiss' testimony, Judge Weinstein stated:

"I must say, I find this whole thing very strange. I know I would suppose if I was representing someone I would tell him, write out what you think or give me a list of names."<sup>17a/</sup>

Later, during the course of the first trial, Judge Mauceri conceded that, prior to being notified by the police of Gra-seck's actions in the holding area, he was also unaware of any prohibition

<sup>17/</sup>  
A 90-91.

<sup>17a/</sup>  
A 97-98.

against attorneys giving pens to clients.<sup>18/</sup> Yet, he, nonetheless, felt that the extraordinary steps, of barring petitioner from the detention cells and notifying Middlemiss both orally and in writing of his actions, were necessary.<sup>19/</sup> Moreover, J. Mauceri didn't feel that petitioner's lack of knowledge of any such rule--if it existed--should have been a relevant factor in arriving at his decision as to how to deal with the complaint by police.<sup>20/</sup>

<sup>18/</sup>  
A 132-33.

<sup>19/</sup>  
A 132, 139; Mauceri testified that he has never communicated with Legal Aid about an attorney other than petitioner.

<sup>20/</sup>  
The following exchange between Mauceri and counsel, at the first trial, is indicative of Mauceri's inability to justify his order barring petitioner from the  
(continued next page)

Although petitioner consistently, and without contradiction, declared that he received no prior notice of any rule forbidding attorneys from leaving pens with detainees, a key factual determination of the District Court was that oral admonishments by the security force personnel in the detention area had been given. (Pet. App. B, p. 17) The Court of

20/ cont'd.

the holding area (A 132-34):

"Q. You had personally promulgated any rule or procedure with regard to writing implements in the detention pen?

A. No.

Q. Prior to your conversation with Patrolman Mitchell [who reported the pen incident to Mauceri] were you aware of that?

A. Allowing them to have pens?

Q. Yes.

A. I wasn't aware. ... No I wasn't aware

Appeals, however, declined to adopt this factual determination. (Pet. App.

20/ cont'd.

of any rule whether they could give it or not give it.

Q. Do you know whether Mr. Graseck was aware of such a rule?

A. I wouldn't know.

Q. Didn't you think that was a relevant consideration before you excused him from the detention pen whether he was knowingly violating the rule?

A. Are you asking me do I think that? No, he was violating the rule according to the police of the detention pen. The(y) felt it was a -- since it was an unusual agreement we had that's why we barred him from going in.

Q. So you didn't think it was relevant whether Mr. Graseck knew or didn't know that he was violating a police rule?

A. True. ...

Q. Did you ask him, did you conduct any investigation to determine whether other institutions, other detention pens or similar institutions had similar rules concerning pens?

A. No, I didn't."

21/  
A, p. 13-14.

In short, the record amply supports petitioner's contention that Middlemiss made no effort to challenge the drastic measures taken by a judicial officer. The attorney in charge did not ask any questions concerning Mauceri's order, even though it was obvious that the factual basis for it was, to say the least, questionable. Moreover, the appropriateness of any such alleged rule was not self evident and Middlemiss' failure to inquire into or seek to delineate the

21/

The Court of Appeals stated:

"Whether the security personnel had previously given instructions never to leave such instruments with detainees because of their potential use as weapons is in dispute."

Petitioner's testimony, in this regard, was disputed only by an assertion contained in the trial Court's memorandum decision.

extent of any restriction on the right of his representatives to freely communicate with Legal Aid clients, who were pre-trial detainees, is noteworthy. See 22/ Judge Weinstein's comments, supra.

22/

The following exchange between Mauceri and counsel is also noteworthy (A 142):

"Q. Did Mr. Middlemiss ask you in any way what the basis of this rule barring pens was?

A. No.

Q. Did he question you in any way concerning the facts of Mr. Graseck's attempting to give a pen to his clients?

A. You mean why Mr. Graseck gave it to him or the fact he left it with him?

Q. No, why he left it with him?

A. No.

Q. Did you tell Mr. Middlemiss how long you were going to exclude Mr. Graseck from the pen for?

A. No."

Clearly, the attorney in charge regarded assuring necessary lawyer-client communication as far less important than immediate responsiveness to a judicial directive, irrespective of the peculiar circumstances in which it was issued and any possible adverse effect it might have on respondent Society's ability to protect the Sixth Amendment rights of its clients. The chronology of events clearly demonstrates that the discharge decision was a response to extraordinary judicial communications to respondent Society. <sup>23/</sup>

On November 15, 1972, following the appearance of charges in Newsday that the Judiciary had interfered with the work of

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<sup>23/</sup>

A 85.

Legal Aid, the Personnel Committee of respondent Society convened to discuss petitioner's dismissal. Immediately prior to the meeting, Middlemiss privately met with the Committee over lunch. <sup>24/</sup>

Clearly, the Committee meeting was not called to specifically review and evaluate dismissal reasons. <sup>25/</sup>

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<sup>24/</sup>

The then President of Suffolk Legal Aid, who was also a member of the personnel committee, Howard M. Finkelstein, testified that at the luncheon (A 164-66):

"... the principal topic was how we were going to run the meeting. We really never had this kind of a meeting to review an administrative decision like this, and we talked about that .../and we discussed the affair, too, the so-called Graseck affair ... we decided that we would hold an informal meeting in the sense we would come to order... we weren't quite sure how to -- how to discuss all of the professional qualifications and activities of Mr. Graseck, and I don't know that we came to any great conclusion. ... We knew that the matter had gotten a great deal of publicity. It was adverse as far as I

(continued next page)

Instead, the purpose of the hearing was to discuss the charges leveled against the Society by petitioner and Boyle that the discharge decision was a response to judicial pressure. Pet. App. B, p. 8. The burden of coming forward was placed <sup>26/</sup> on petitioner throughout the meeting.

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24/ cont'd.

was concerned to the Legal Aid Society, and was doing us no good ... so we had a public relations problem on our hands ..."

25/

In fact, Finkelstein's testimony indicated that the Committee was more concerned about adverse publicity than with resolving the controversy which precipitated the meeting (A 175):

"Except for the charges that Graseck had wielded against us which had gotten this publicity and, you know, which the newspapers feed on, we really probably wouldn't have had a meeting."

26/

A 175.

Indeed, the fairness of the meeting was also brought into question by Finkelstein's comment, at the first trial, that, in any event, he was predisposed to the view the Society could still "... hire and fire <sup>27/</sup> at will."

Moreover, no independent investigation into any of the factual bases for the dismissal was conducted. Judges Green and Mauceri were not present at the meeting and, at no time, was the committee presented with a written list <sup>28/</sup> of charges against petitioner.

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27/

Id.

28/

"The meeting was divided into two parts; during the first half, which was open to the public, former clients of plaintiff testified on his behalf. Thereafter, the balance of the meeting was conducted in private among plaintiff, Boyle, ... [respondent] Middlemiss, Costello and the five members of the Personnel Committee."

On the day of the meeting, the Committee voted four to one to uphold the dismissal. (Pet. App. B, p. 9 )

On January 24, 1973 The Society's Board of Directors met for the purpose of reviewing the decision of the Personnel Committee. The body simply voted to uphold Middlemiss' decision without stating its reasons for so doing. Pet. App. B, p. 9 . Petitioner was neither informed of nor present at this meeting. Pet. App. B, p. 9.

The dismissal procedure--or lack thereof--was indicative of Legal Aid's perception of its role as a mere adjunct of the Court; the Society never evaluated

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28/ cont'd.

The Personnel Committee then deliberated in private. (Pet. App. B, p. 8 )

the impact its action would have on service to clients, but focused only on avoiding adverse publicity while being uncritically obedient to a judicial demand. It is apparent that due process safeguards which would be available to a retained attorney, perceived by a complaining Judge as overzealous, were not afforded petitioner.

An evaluation of the reasons offered to justify the dismissal and the events surrounding it demonstrates that respondent Society seriously infringed on the constitutional rights of its clients and of petitioner. The dismissal signaled to its staff the Society's preference for uncritical responsiveness to judicial suggestions over vigorous advocacy on behalf of indigent clients. It was Legal

Aid's abdication of its adversary role which prompted Mr. Boyle to resign.

Addendum pp. 27-28.

Because of the Society's attempts to support its dismissal decision on the ground that petitioner allegedly exercised poor judgment, it is noteworthy that Legal Aid's view of its role had previously prompted serious criticism. In a 1970 letter to the Economic Opportunity Council of Suffolk, Inc., the Federal Office of Economic Opportunity (OEO), after conducting an extensive review of the program offered by the Society, declared it would not provide any new assistance to Respondent organization, explaining:

"This program has failed to provide quality legal representation

to the client community. Attorneys have demonstrated a lack of awareness of their responsibility for full representation of client's causes, and a lack of motivation for aggressive advocacy."

See Addendum, pp.1-8 quote at p. 2.

According to OEO, the tension between Legal Aid and the indigent community reached the point where the dominate welfare group in Suffolk County opposed the refunding of the Society (Id., at p. 4 . The facts marshaled in the OEO letter are consistent with the Society's more recent displays of unwillingness to provide effective representation to the poor of Suffolk County, when such vigorous advocacy will jeopardize its close relationship with members of the Bench, in-

cluding especially Presiding Judge Mauceri, who was helpful in securing funding for Legal Aid.

Following Judge Weinstein's decision to recuse himself, on application of respondents, the state action issue was again argued, both before Chief Judge Mishler and before the Second Circuit. Both determinations were inconsistent with Judge Weinstein's conclusion that Legal Aid engaged in state action.

The Court of Appeals acknowledged that there was at least "... an attenuated causal connection between the conduct of the judges and the action taken by the Society that normally does not exist in the regulatory context." Pet. App. A, p.29 . The Court concluded, however, that Legal Aid "...initiated the dismissal

based on its own independent evaluation of its needs, rather than at the behest of the state judges." Pet. App. A, p. 37. Despite the chronology of events and testimony discussed herein, the Court "...refuse~~d~~ to read ..." any improper motives into the various communications from Judges Mauceri and Green to the Society, which resulted in Graseck's firing. Pet. App. A, pp.35, 32, 34 . It dismissed Judge Mauceri's comment "to get this guy out of my court" as a statement "... made in a moment of anger ...". Pet. App. A, p. 36.

Because it held that the decision should be affirmed on the basis of its view of the State action issue, the Court of Appeals did not reach the merits of petitioner's complaint or consider the

question of due process. Pet. App. A, p. 38.

#### REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRED IN DETERMINING THAT THE DEFENDANTS-RESPONDENTS DID NOT ENGAGE IN STATE ACTION BY DISMISSING PETITIONER, THEREBY SANCTIONING IMPOSITION OF A PENALTY FOR THE EXERCISE OF CONSTITUTIONAL RIGHTS.

#### A. The Court of Appeals Erred in Failing to Find State Action in Spite of the Existence of a Symbiotic Relationship Which Existed Between the State and Respondent Society.

In reaching its final decision, the Court of Appeals acknowledged that: "The Supreme Court has not yet addressed the extent to which the "Symbiotic relationship" analysis of Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) survives Jackson v. Metropolitan Edison Co., 419 U. S. 345 (1974)." Pet.

App. A, pp. 27-28. The Court, citing several First, Second and Third Circuit cases, noted that there is post-Jackson precedent for the proposition that actions of a private institution may fall within the state action classification "... even in the absence of direct State involvement in the challenged activity." Pet. App. A, p. 28. Nevertheless, the Second Circuit's reasoning, focusing almost exclusively on the nexus approach to analyzing the state action issue set forth in Jackson, made only a passing and confusing reference to the Burton mode of analysis:

"not unmindful of the close working relationship here, we believe that the absence of governmental participation, let alone of

"substantial" participation, in the Society's general management and internal operations precludes a finding in this case of the degree of pervasive interdependence or partnership contemplated by Burton. See Braden v. Univ. of Pittsburgh, supra, 496 F. 2d at 635; cf. Schlein v. Milford Hosp., Inc., supra, 561 F. 2d at 428-29 (holding no state action because of absence of a nexus without discussing symbiotic relationship analysis, where the state played no part in either formulating hiring procedures of hospital or applying them to appellant.)" Pet. App. A, pp. 28-29.

One of the cases from the First Circuit, cited by the Court below, noted that Jackson specifically reaffirmed Burton's vitality in situations where a symbiotic relationship between the government and the private party being sued could be found to exist. Downs v. Sawtelle, 574 F. 2d 1 (First Cir. 1978). Quoting language from Holodnak v. AVCO Corp., Avco-Lycoming Div., Stratford, 514 F. 2d 285 (Second Cir. 1975), cert. denied 423 U. S. 892 (1975), the Court in Downs observed at p. 8. that Jackson "... took pains to stress that the absence of any proof of state initiation or enforcement would not necessarily be dispositive in all cases ... that where the state goes beyond mere regulation of private

conduct and becomes in effect a 'partner' or 'joint venturer' in the enterprise the inference of state responsibility for the proscribed conduct could more easily be made."

The Second Circuit, however, limited its discussion and failed to take account of the fact that a mutually beneficial relationship, such as the one existing between the State and Respondent Society, is the cornerstone of the symbiotic relationship contemplated by Burton. The symbiotic nature of their relationship is apparent from the fact that Legal Aid engaged in the constitutionally mandated service of providing legal assistance to indigents and plays a central role in the management of the Court's congested criminal

29/  
calendar in exchange for exclusive funding of its operation by Suffolk County and the performance of administrative favors by the Court.  
30/

29/  
See comments of Judge Weinstein, supra at fn. 2 (herein); Also see testimony of Edward M. Elliot, a former colleague of petitioner at the Society's District Court Bureau, indicating that he viewed his role as analogous to that of a factory worker, with the judge playing the role of production manager (A 266-67):

"It's [arraignment part] almost like a machine operation, you just keep going to make sure things are handled properly and the parties are given their rights and released as soon as possible?

A. Yes ..."

30/  
A 128-30; Administrative Judge Mauceri testified that he had assisted Legal Aid in obtaining funding from the County, supplied it with the services of a Spanish interpreter and, at one time, he had adjusted the Court's internal assignment policy so that Society attorneys would  
(continued next page)

In Braden v. Univ. of Pittsburgh, 552 F. 2d 948, 961 (Third Cir. 1977), the Court held that the actions of a private educational institution constituted state action where: "The state ... /through its aid program to the private institution/ was able to satisfy the educational needs of its citizens at a cost considerably lower than would have been entailed by the creation of wholly new institutions. Concomitantly Pitt /University/ was able to survive as an institution of higher education ..."; Also See Holodnak v. Avco Corp., Avco-Lycoming Div., Stratford, supra at 289-90 (a suit 30/ cont'd represent only defendants held in custody and would be required to cover a limited number of parts.

by a union employee protesting his firing by a defense contractor for publishing an article critical of his employer and of union practices, in which the Court held that a symbiotic relationship existed between the federal government and the AVCO company, because, by supporting AVCO's plant operation, the government was simultaneously furthering its "... constitutional interest in raising and supporting an Army, and providing and maintaining a Navy. U. S. CONST. Art. I, [8, cis. 12, 13." (emphasis added)

It is apparent that the Second Circuit erred in failing to focus on the primary significance of the symbiotic relationship doctrine in addressing the state action issue in this case.

B. The Court of Appeals' ruling, calling for a higher degree of state involvement in this case, on the basis of the assumption that the challenged activity does not involve racial discrimination, should be reviewed in light of recent judicial criticism of preferential treatment for minority group members or, in the alternative, on the ground that there are, in any event, strong overtones of racial discrimination in the dismissal of petitioner.

In reaching its decision to review the relationship between the State and the Legal Aid Society under a rigorous standard before finding state action, the Second Circuit declared "...that the less stringent state action standard utilized in racial discrimination cases

is inapplicable here." Pet. App. A, p. 20. The Court did not explain how it reached this conclusion and failed to discuss the implications of its determination in light of the recent case of Regents of University of California v. Bakke, 98 S. Ct. 2733 (1978).

Giving preferential treatment to civil rights litigants who claim that they have been the object of racial discrimination may contravene the spirit of the Bakke determination. As this Court pointed out at 98 S. Ct. 2752: "... there are serious problems of justice connected with the idea of preference itself." The First Circuit has already expressed its disagreement with the Second Circuit on this issue. See Downs v. Sawtelle, supra. Moreover, the First Cir-

cuit has declared that even if preferential treatment of racial cases could be supported, it "... would be inclined to group infringements of fundamental rights and racial discrimination together for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases." Downs v. Sawtelle, supra at 6, n. 5.

Assuming, arguendo, that special scrutiny should be given to cases involving alleged racial discrimination, this case does have significant racial implications. The discharge was based, in part, on petitioner's involvement in cases involving complaints of police brutality. 31/

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31/ Graseck, on occasion, traveled to the Suffolk County Human Rights Commission (continued next page)

That police brutality was a serious problem in Suffolk County, meriting the attention of bench and bar alike, is a matter of public record. See, e.g., Coleman v. Klein, E.D.N.Y., 73 Civ. 1857 (JBW) Decision dictated into record. Respondent Society, however, perceived petitioner's efforts to grapple with the problem within the context of his representation of indigent criminal defendants as a preoccupation rather than as a useful way for a legal aid attorney to expend his energies. 32/

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31/ cont'd.

and to the Internal Affairs Division of the Suffolk County Police Department. (A 51) His former supervisor, Tom Boyle, also made a point of assigning him cases in which it appeared that criminal charges had been lodged in an attempt to "cover up" police misconduct. See supra at fn. 5.

The reasoning on the basis of which the Second Circuit applies a more flexible standard in finding state action when direct allegations of racial discrimination 32/

See Trial Transcript, May 31, 1977, at 19. As previously indicated, Judge Mauceri's order banning Graseck from the Court detention area was issued at the behest of the Suffolk County Police Department. Mauceri's responsiveness to the Police Department was striking. He readily acceded to the request of a Patrolman that petitioner be excluded from the holding pens, although he himself was unaware of any rule against providing detainees with pens. The following is the exchange at trial between counsel and Mauceri on this point (A 131):

"Q. And what did he [Patrolman Mitchell] say to you after he told you that Mr. Graseck had given the pen to a prisoner?

A. He [Graseck] had done that and left without telling anybody ... he [Patrolman Mitchell] said on occasion he's [petitioner's] done it before and would it be all right to keep him out of the back (continued next page)

are involved would justify application of that standard to this case. See Taylor v. Consolidated Edison Co. of New York, Inc., 552 F. 2d 39, 42 (Second Cir. 1977), cert denied, 434 U.S. 845 (1977): "Because of the generally recognized anathematic status of any government sponsored racial discrimination, for instance, we have held that a lesser degree of state involvement is needed in cases alleging such discrimination ...". It is apparent that racial minorities are overrepresented both as clients of

32/ cont'd.

room of the .../lock up/. So I said, fine.

Q. Was there a rule at that time [which] forbade prisoners from having pens in the ... /lock up/?

A. I assume there was no rule."

such free legal assistance programs as that respondent Society contracts to provide and as victims of police misconduct. Because a Legal Aid lawyer, to a far greater extent than a private attorney, can be accurately categorized as an attorney for minority groups, action directed against a lawyer for indigent defendants, because of his insistence on behalf of such clients, is closely related to racial discrimination.

For the foregoing reasons, it is respectfully urged that this Court grant the within petition, inter alia for the purpose of making it clear, as the First Circuit has declared, that the existence or absence of state action cannot depend on whether claims of racial discrimination, as distinguished

from other violations of fundamental rights, are before the Court.

C. The Second Circuit erred in concluding that respondent Society did not engage in state action, even though it was virtually the sole source of legal representation for indigent criminal defendants charged in Suffolk County and was exclusively funded by the County.

The Court below rejected the argument that Legal Aid had engaged in state action in dismissing petitioner by virtue of the fact that its activities in the criminal area were exclusively funded by Suffolk County and that it had never maintained a meaningful private existence prior to such funding. Pet. App. A, pp. 21-24. Lefcourt v.

Legal Aid Society, 445 F. 2d 1150 (Second Cir. 1971) was treated as controlling even though the defendant, in that case, received considerable private financing and had maintained a healthy private existence long before it sought governmental assistance.

In sharp contrast, respondent Society, herein, enjoys its virtual monopoly status in the area of indigent criminal defense entirely as a result of its contractual arrangement with Suffolk County, which entity is the sole source of its funding. Pet. App. A, p. 22 fn. 19. Because of the County's decision to enter into agreements with Legal Aid, almost all indigent criminal defendants in Suffolk County must accept

representation by one or more of respondent Society's agents or undertake to act as their own counsel.

Because of the inability of an indigent defendant to make his own selection, it is extremely difficult for a legal aid attorney to develop a good rapport with him--so important to the presentation of an adequate defense, which depends upon a good working relationship between attorney and client.

33/

See Report by Jonathan D. Casper, Department of Political Science, Stanford University, "Criminal Courts: The defendant's Perspective (1976) pp. 211-12, "One of the major sources of client suspicion ... is the institutional position of the public defender. Public defenders (whether assigned or working for public defender organizations) do not engage in financial exchanges with clients, and hence clients do not feel they have the leverage that such an exchange can provide. Moreover, the

The Legal Aid Society of Suffolk County never developed a tradition of vigorous assertion of defendants' rights. The criminal division owes its role and existence exclusively to the County's decision to contract with it. Therefore, respondent Society, which enjoys virtual monopoly status in Suffolk County 33/

client typically cannot choose his public defender, but one is simply "given" to him. Finally not only is the client not in a position to pay the public defender, but someone else is; and that "someone" is also paying the prosecutor and judge, leading many defendants to have real doubts as to whether "their" lawyer really belongs to them. ... Many defendants believe--rightly or wrongly--that privately retained attorneys are "real" lawyers, and that appointed counsel are somehow inferior substitutes. This belief ... stems from the fact that there is a marketplace in which one can "buy" the services of attorneys. Defendants realize that they cannot participate in it but believe that what is available there is somehow superior to what is "given" them free of charge. ..."

as the provider of criminal defense services to indigents, almost unilaterally determines the quality of representation available to such clients. Moreover, it irresponsibly heightens client distrust by focusing on judicial concerns and neglecting those of indigent defendants.

Legal Aid's virtual exclusive control over the funds for the defense of indigent criminal defendants in Suffolk County enables it to restrain its staff from engaging in the vigorous representation to which clients are entitled pursuant to the Code of Professional Responsibility and in accordance with the Sixth Amendment. The monopoly status enjoyed by respondent Society gives it the power to set an

informal standard and to deprive its clientele of the right to vigorous legal representation. See, for example, A 310-34, Addendum, pp. 36-54, statements of employees and of former clients of respondent Society which were admitted into evidence during trial, particularly at pp. 36-39, 40. The connection between Legal Aid's County-created monopoly status and its willingness and power to subordinate provision of determined advocacy to maintaining rapport with powerful representatives of the local government, strongly indicates that a finding of state action on the part of respondent Society should have been made. In Jackson v. Metropolitan Edison Co., supra, 419 U. S. 351-52, this Court indicated that a sufficient

"... relationship between the challenged actions of the entities involved and their monopoly status ..." might render appropriate a finding of state action.

D. The Second Circuit's conclusion that there was no state action makes possible evasion of Sixth Amendment responsibilities; by enabling the State to delegate such obligations to a formally private entity, which cannot be held accountable for civil rights violations.

Since Gideon v. Wainwright, 372 U.S. 335 (1963), the fundamental and sweeping nature of the Sixth Amendment's guarantee of the right to counsel has been clear. The conclusion that respondent Society did not engage in state action could seriously undermine the

special protection afforded under the Sixth Amendment and effect a de facto repeal of the Gideon decision.

By permitting the actions of Legal Aid, the transferee of the government's responsibility to provide counsel for indigents, to be treated as private conduct, the Court's decision seems to provide a loop hole, which will make possible evasion of the Sixth Amendment duty to provide the meaningful and effective assistance of counsel to indigents.

In practical effect, the Second Circuit has ruled that Sixth Amendment protections cannot be enforced on behalf of the poor. Thus, a dangerous precedent is established which can be used to frustrate the goal of equal justice

under law, by relegating to indigent defendants the mere form of representation by counsel, without the reality of independent advocacy.

The problem of providing adequate representation to the powerless is most difficult. It appears that such clients' inability to effectively demand quality representation renders enforcement of theoretical rights virtually impossible, particularly if federal courts can be expected to determine that they lack jurisdiction to consider such matters.

In a paper entitled Inmate Study of 18 B Indigent Defense Panel (Court Appointed Attorneys) prepared by The Prison Reform Task Force of the New York Society for Ethical Culture for

Inmate Committee for Judicial and Legislative Reform, dated May 27, 1977, the following language was used at p. 7:

"... Judge Irving Ben Cooper ..., in speaking of one particular trial on the federal level stated that the attorneys appointed by the court "lacked preparation, failed to submit the memoranda of law he asked for, did not call defense witnesses, failed to question government witnesses and failed to advance any theory in the case that would help their client 'the impression was poor, it was ragged, it was disheartening'." ... What Judge Cooper said of the attorneys in that particular trial can also be said for the

majority of cases of indigent defendants who are respondents to this survey."

Moreover, the broader implications of this decision might enable the State to ignore other responsibilities, spelled out in the Constitution, by transferring the implementation of such obligations to formally private individuals or groups.

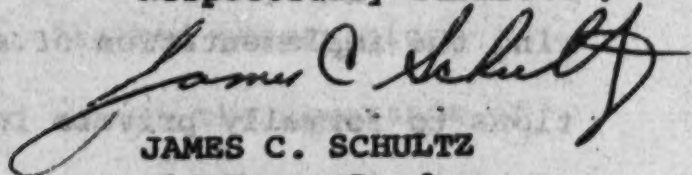
Therefore, it is respectfully urged that this Court grant certiorari to review the Second Circuit determination, in order to protect the fundamental nature of the Sixth Amendment guarantee from erosion, through the mechanism of delegation of responsibility from the State to a formally private entity.

**CONCLUSION**

For the reasons stated, the  
Petitioner respectfully prays that the  
Writ of Certiorari be GRANTED.

Dated: Port Washington, New York  
November 20, 1978.

Respectfully submitted,



JAMES C. SCHULTZ  
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ARTHUR V. GRASECK, JR.,  
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**Attorneys for Petitioner**

**A D D E N D A**

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LETTER DATED FEBRUARY 27, 1970

(RETYPE)

FEB 27, 1970 (stamped)

Mr. William Larregui (handwritten):  
Director  
Economic Opportunity Council ltr also to  
of Suffolk, Inc. CC: to Louis F. Buck  
83 East Main Street Chrman.  
Patchogue, Long Island, New York Bd. of Dirs.

Dear Mr. Larregui:

The Office of Economic Opportunity has conducted an extensive review of the legal services program conducted by the Legal Aid Society of Suffolk County, Inc., ("The Legal Aid Society," a delegate agency of the Economic Opportunity Council of Suffolk, Inc., (the Economic Opportunity Council"). We have concluded that the program conducted by the Legal Aid Society has been ineffective and inefficient and has failed to provide adequate legal representation to the poor of Suffolk County. Consequently, the Office of Economic Opportunity has made a tentative decision not to provide new assistance to the Legal Aid Society after March 31, 1970. However, to enable the Legal Aid Society to conclude its program we are providing the Economic Opportunity Council with a

grant of \$43,362 to be delegated to the Legal Aid Society. It should be noted that the termination date of this grant is March 31, 1970.

We request that the Economic Opportunity Council and the Legal Aid Society submit a plan for closing its current program. This plan must include adequate provision for handling the current cases which Legal Aid attorneys have received as part of the approved work program of the Office of Economic Opportunity grant. Such a plan should be submitted no later than March 15, 1970 to Terry F. Lenzner, Associate Director for Legal Services, Office of Economic Opportunity, 1200 19th Street, N.W., Washington, D. C. 20506.

The following reasons form the basis of the Office of Economic Opportunity's decision not to refund that portion of Office of Economic Opportunity Grant No. 0394 which is used to support the activities of the Legal Aid Society.

1. The program has failed to provide quality legal representation to the client community. Attorneys have demonstrated a lack of awareness of their responsibility for full representation of clients' causes, and a lack of motivation for aggressive advocacy. One attorney had never appealed a

2. welfare hearing decision on the ground that the client could not afford the cost of the transcripts although in New York State transcripts are provided without charge. Other attorneys had no knowledge of relevant legislation and court decisions. Reflective of the situation is the total inadequacy of the libraries. One attorney had a copy of the Poverty Law Reporter in which not one supplement had been filed. The attorney indicated that he rarely researches a point of law. Many of the attorneys have only recently been admitted to the Bar and yet there are no regular staff meetings or training sessions. The end result has been a low quality of service.

Statistical reports for 1969 further indicate a marked lack of activity by the Legal Aid Society. For example, the statistical report submitted by the Legal Aid Society to the Office of Economic Opportunity (CAP Form 58a) for the period October--December 1969 indicates that during the three month period, the project accepted 1,395 cases. Of that number only 77 cases were litigated and only 78 of the cases not litigated

were resolved in a manner which

The special conditions state:

2. The Legal Aid Society has failed to provide adequate skilled legal representation to the low income residents of Suffolk County. Evaluators who visited the program found significant dissatisfaction among members of the client community regarding the operations of Suffolk legal aid. Some clients complained of the lack of communication between attorneys and clients. Others complained that the attorneys were vague and unprepared in court. The bitterness of the complaints is best illustrated by the negative attitudes of many welfare recipients. They found the attorneys disinterested and in some instances hostile to their problems. As a result, the dominant welfare group in the county has retained its own counsel and actually opposed refunding of the Legal Aid Society. The existence of this situation is indicative of the program's obvious lack of communication with the community.
3. The special conditions of the grant to the Legal Aid Society stress the importance of the project's actively engaging in both

community action and law reform.  
The special conditions state:

"By March 1, 1969, delegate agency shall submit satisfactory to the Regional Legal Services Director of Office of Economic Opportunity's detailed program, of law reform and community action, including:

1. Long range and short range goals
2. Participation of the target community and low income groups in establishing priorities
3. Organization, incorporation, and representation of low income groups
4. Test cases and class actions
5. Legislative and administrative reform
6. Provisions for backup research
7. Intra-project and inter-project coordination
8. Timetable for implementation

The project has not only failed to submit the detailed program in a manner satisfactory to the Office of Economic Opportunity Regional Services Office as required by the special conditions but has also failed to involve itself in an adequate manner in community action

or law reform. Most of the attorneys admitted to evaluators that they never get out into the community and rely solely upon clients who walk in for services. The investigators' work is primarily eligibility investigations. The evaluation indicated that they have never worked with any community group or had any significant contacts within the poor community.

4. The project has failed to develop and implement acceptable priorities in accordance with special conditions incorporated in previous grants from the Office of Economic Opportunity. The absence of such priorities has resulted in the growth of an unmanageable and undefined caseload. For example: one attorney had opened 690 new matters in a recent three month period. Such a situation renders it impossible to adequately give even routine legal advice, much less deal with law reform issues or to thoroughly research a point of law. Conditions which impair judgment or deteriorate the quality of legal counselling constitute a violation of the promise to provide quality legal representation. No one attorney has developed an expertise in any area of poverty law, resulting in wholly inadequate progress in initiating meaningful

law reform activity on behalf of the low income residents of the community.

5. The Board of Directors has not demonstrated the ability to function as an effective policy-making body. Meetings are infrequent with varying attendance.

In accordance with Office of Economic Opportunity policy, you may submit written material in refutation of the reasons for the Office of Economic Opportunity tentative decision not to refund the Legal Aid Society. In addition, the Office of Economic Opportunity will, at your request, hold an informal meeting at which time you may make an oral presentation as to why the Legal Aid Society should be refunded. Any request for such an informal meeting must be made in writing by the Board of Directors of the Economic Opportunity Council and/or by the Board of Directors of the Legal Aid Society no later than March 10, 1970. Any such request should be sent by registered mail to Terry. F. Lenzner, Associate Director for Legal Services, Office of Economic Opportunity, 1200 19th Street, Northwest, Washington, D. C. 20506.

Both the Economic Opportunity Council and the Legal Aid Society have the right

to be represented by counsel at the informal meeting discussed above. In addition, the Office of Economic Opportunity will at your request authorize the Boards of Directors of the Economic Opportunity Council and the Legal Aid Society to use grant funds to pay travel and per diem expenses for two representatives of each organization to attend the informal meeting. If the Economic Opportunity Council wishes to be represented by an attorney at the informal meeting and does not have an attorney acting in that capacity as a regular staff member, the Council will be authorized to use grant funds to obtain the services of an attorney. This use of grant funds will be limited, however, to the payment of a legal fee which may not exceed \$100 for an attorney to attend the meeting and the travel expenses and per diem of the attorney. If the Legal Aid Society wishes to be represented by counsel at the informal meeting the Board of Directors of the Legal Aid Society will be authorized to use grant funds to pay the travel and per diem expenses of an attorney on its staff to attend the meeting. The payment of all travel and per diem expenses must be in strict conformity with Office of Economic Opportunity Instruction 6910-1.

Sincerely,

Terry F. Lenzner  
Associate Director for  
the Office of Legal Services

**PLAINTIFF'S EXHIBIT 5**

**RESUME OF ARTHUR V. GRASECK, JR.**

**ARTHUR V. GRASECK, JR.**

**70 Davis Road**

**Port Washington, New York 11050**

**516 PO7-2486**

**PERSONAL:** Age: 39; Single; Military  
Obligation Completed  
Bar Status: Member of New York  
and Federal Bars

**LEGAL**

**EDUCATION:** NEW YORK UNIVERSITY LAW SCHOOL,  
LL.M., June, 1968  
YALE LAW SCHOOL, LL.B., June,  
1963  
Finalist, CARDOZO Moot Court  
Brief Prize; Legal Aid

**PRE-LEGAL**

**EDUCATION:** HOBART COLLEGE, B.A., August,  
1956  
Major: Sociology  
Honors: Phi Beta Kappa  
Cum Laude  
Sociology Prize

**LEGAL**

**EMPLOYMENT:** PRIVATE PRACTICE, representing  
criminal defendants. 10/72-Present  
SUFFOLK COUNTY LEGAL AID, repre-  
senting defendants in criminal

matters. 7/71-10/72

COUNSEL, Assemblyman Irwin  
J. Landes, 18th A.D., Draft-  
ing proposed legislation.  
1/71-4/71

DEPUTY NASSAU COUNTY ATTORNEY,  
Mineola, New York, 2/67-12/67;  
1/69-1/71.  
Arguing Article 78 proceedings,  
research on proposed County  
projects, appellate briefs,  
opinion letters.

NASSAU COUNTY LAW SERVICES  
COMMITTEE, INC., Mineola,  
New York, 7/68-1/69  
Attorney in charge of Hemp-  
stead Office; arguing and  
preparing cases for court and  
administrative determination.

COOPER, OSTRIN, DEVARCO AND  
ACKERMAN, New York City,  
12/67-7/68  
Arguing before administrative  
agencies, trial assistant  
in court cases, appellate  
briefs.

NEW YORK STATE LABOR RE-  
LATIONS BOARD, New York City,  
10/64-1/67  
Drafting decisions, review-  
ing and reporting on records

Watters. 7/71-10/72

COUNSELL, Assemblyman Iwlin  
J. Landes, 18th A.D., Draft-  
ing proposed legislation.  
1/71-4/71

DEPUTY NASSAU COUNTY ATTORNEY,  
Minneapolis, New York, 2/67-12/67;  
1/69-1/71.  
Arguing Article 78 proceedings,  
research on proposed County  
projects, appellate briefs,  
opinion letters.

NASSAU COUNTY LAW 22 FIRM  
COMMITTEE, INC., MINNEAPOLIS,  
New York, 7/68-1/72  
Attorney in charge of Hennepin  
County Office; arguing and  
preparing cases for court and  
administrative determination.

COOPER, OSTIN, DEWICK AND  
ACKERMAN, New York City.  
12/67-7/68  
Arguing before administrative  
agencies, trial assistance  
in court cases, appellate  
briefs.

NEW YORK STATE LABOR RE-  
LATIONS BOARD, New York City.  
10/64-1/67  
Drafting regulations, review-  
ing and reporting on records

of hearings, interviewing  
complainants, preparing  
charges and petitions,  
supervising representation  
elections.

**SERVICE**

**RECORD:**

U.S. NAVY, 2/57-6/60

Duties: Intelligence  
Agent, Ship's Legal Officer  
Argued court-martial cases.

PLAINTIFF'S EXHIBIT 10

NEWSPAPER ARTICLE

(RETYPE)

LEGAL AID CHIEF RESIGNS IN DISPUTE

By John Hildebrand November 7, 1972

A branch chief of the Suffolk Legal Aid Society has resigned, charging that the society has bowed to undue pressures from the administrative judge of the District Court, Angelo Mauceri. Mauceri has angrily denied the charge.

Attorney E. Thomas Boyle, head of a six-man Legal Aid unit in Riverhead, charged in his resignation letter of Oct. 31 that the society has recently fired a fellow lawyer, Arthur Graseck, for falling into "judicial disfavor."

"...It is of grave importance that the Legal Aid Society, despite its County

funding, remain independent and totally uninfluenced by any branch of County Government," wrote Boyle, whose resignation is to take effect Dec. 1.

"Mr. Boyle is off his rocker!" replied Mauceri, who has been in charge of administration for Suffolk's District Court system since the first of the year. While he denied applying pressure, Mauceri said that he had twice criticized Graseck's courtroom behavior in talks with Graseck himself and with two of his Legal Aid superiors. The society is a private corporation that has received more than \$600,000 in county funds this year to defend impoverished persons.

Boyle's letter contended that Legal Aid's staff director of 12 years, John F.

Middlemiss Jr., had fired Graseck on Oct. 13 because of Mauceri's pressure. A copy of the letter was given to Newsday by an outside source who asked not to be named. Middlemiss denied that pressure had been applied and declined to discuss his reasons for firing Graseck, saying only that the action was prompted by "certain actions (by Graseck) brought to my attention by Judge Mauceri and many other people."

"Look, what's the alternative?" asked Mauceri, in discussing his criticism of Graseck. "I could go to the Bar Association (for a formal hearing). But maybe the guy made a mistake. So I call his boss just like I would with any private lawyer." Mauceri added that, in

his five years on the Suffolk bench,  
he has not found cause to criticize any  
other lawyer in the same way.

As an example of what he considered  
to be Graseck's "improper" behavior,  
Mauceri cited a court paper signed by  
the 36-year-old lawyer in September. In  
that document, a review of a criminal  
trial, Graseck suggested that another  
district judge "has functioned as an  
agent of the district attorney ..."

Mauceri said that he thought Graseck  
should refrain from such charges, unless  
he were willing to submit them to the  
Suffolk County Bar Association for review.

"The guy's a bum," said Mauceri of  
his courtroom encounters with Graseck.  
"He comes into court soiled all the time --

looks like a bum off the Bowery." But he added that his formal criticism of Graseck had applied to courtroom actions, not attire. Graseck and Boyle declined to comment on Mauceri's statements, saying that they were awaiting a review of the case by the Legal Aid Society.

"I'd just like to give Legal Aid a chance to take a fresh look at what's happened," said Graseck, a Port Washington resident with prematurely gray, shoulder length hair, who favors modish knit suits and wide ties. Legal Aid officials confirmed that their personnel committee had tentatively scheduled a Nov. 15 meeting to discuss the matter.

While society officers would not comment directly on the dispute, several said they were not surprised that Graseck,

who considers himself a social activist, would ruffle some local officials.

"In this area, I think you've got to get along with the bench," said one Legal Aid director, himself a lawyer. "In one area, like Suffolk, a lawyer may take very strong positions in a case, and it'll subject him to criticism ... But in another area, like Manhattan say, people are willing to accept it ... The spirit here is toward getting along. This is more of a provincial community." Legal Aid Officials agreed on the competence of Boyle, a soft-spoken, 33-year old St. James resident who has worked for the society for six years. Many said they hoped that Boyle would not quit, which could create a backlog of cases. "He's a good lawyer," Mauceri conceded.

"But he has an immature mind."

Photograph of E. Thomas  
Boyle

Newsday Photo by Mitch Turner

"...It is of grave importance that the  
Legal Aid Society ... remain independent  
....," said lawyer E. Thomas Boyle, who  
resigned criticizing the actions of Judge  
Angelo Mauceri.

**Photograph of Angelo  
Mauceri**

**Newsday Photo by George Rubef**

**"Mr. Boyle is off his rocker!" replied Angelo Mauceri, the administrative judge of Suffolk's District Court, seen here during the 1971 election.**

**PLAINTIFF'S EXHIBIT 11**

**NEWSPAPER ARTICLE**

**(RETYPE)**

**CRITIC'S RESIGNATION QUESTIONED**

**By John Hildebrand**

**November 9, 1972**

District Court Administrative Judge Angelo Mauceri has said that a critic who recently resigned from the Suffolk Legal Aid Society, protesting "pressures" from the judge, might have been planning to quit anyway.

The critic, Legal Aid branch chief E. Thomas Boyle denied this. He said, relatives had encouraged him to enter private practice, but added that he had not agreed to the idea. Last week, Boyle resigned effective Dec. 1, charging that the society had fired a fellow lawyer, Arthur Graseck, for falling into Mauceri's

PLAINTIFF'S EXHIBIT 11

NEWSPAPER ARTICLE

(RETYPE)

CRITIC'S RESIGNATION QUESTIONED

By John Hildebrand November 9, 1972

District Court Administrative Judge

Angelo Mauceri has said that a critic who

recently resigned from the Suffolk Legal

Aid Society, protesting "pressure" from

the judge, might have been planning to

quit anyway.

The critic, Legal Aid branch chief

E. Thomas Boyle denied this. He said,

relatives had encouraged him to enter

private practice, but added that he had

not agreed to the idea. Last week, Boyle

resigned effective Dec. 1, charging that

the society had fired a fellow lawyer.

Arthur Grassick, for failing to Mauceri's

"judicial disfavor." Boyle contended that the independence of the society, which defends indigents in court, was at stake.

Boyle In a Nov. 2 letter to the society, Mauceri denied the allegation, and said: "I want...to state, for no other reason but to show my utter distaste and contempt for this type of attack, that on two occasions earlier this year Mr. E.T.B. (Boyle) told me he was being asked to go into private practice ... This alleged incident (the firing) may have been the catalyst for him."

Finally Mauceri complained also that Boyle, despite his "fervor for independence from the judiciary," had asked him earlier this year to lobby for passage of Legal Aid's requested \$1,200,000 county budget. Mauceri has been the administrative judge of the

county's 258-employee district court system since the first of the year.

"I have no future plans," replied Boyle, who heads a six-man Legal Aid unit in Riverhead. He declined to comment on his alleged request to Mauceri to lobby for Legal Aid's budget, saying that he wanted to discuss the matter privately with the society's personnel committee. The committee is tentatively scheduled to review the Mauceri-Boyle dispute Wednesday.

In a related development, Mauceri flatly denied a published report that he had referred to Graseck, the fired attorney, as "a bum." But a reporter's notes, based on a recent half-hour interview with the judge, indicate that Mauceri said of Graseck: "He comes into court soiled all

the time -- looks like a bum off the Bowery."

Henry G. Wenzel, a past president of the Suffolk Bar Association, said that the association probably would not review the case unless one of the disputants requested such action. "I can't call to mind anything that would prevent a judge from criticizing the attire of an attorney when he comes to court," said Wenzel.

Graseck has declined to reply publicly to Mauceri's comments, saying that he wants to give Legal Aid "a chance to take a fresh look at what's happened." The 36-year-old Port Washington attorney, who studied at the Yale and New York University law schools, worked at Suffolk Legal Aid from July, 1971 to last Oct. 13

and said he handled about 40 cases. He has said that he formerly worked for a Manhattan law firm, the State Labor Relations Board and the county attorney's office in Nassau.

Shortly before he was fired, Graseck was assigned by Legal Aid to represent Etanislao Oquendo, a Brentwood man charged with resisting arrest and harassment of police. The dismissal was effective shortly before Oquendo's trial began. Society officials have said that they would have provided another lawyer for Oquendo, but Graseck retained the case, though he said he received no payment. A jury found Oquendo innocent on the first charge, and was unable to decide on the second. A retrial is scheduled for Nov. 27, and Graseck says he will defend Oquendo again.

John F. Middlemiss Jr., the Legal Aid director, has said that he fired Graseck for "certain actions brought to my attention by Judge Mauceri and many other people." One complaint by Mauceri involved a court paper written last September by Graseck, which suggested that District Court Judge Edward U. Green had "functioned as an agent of the district attorney..." Green said yesterday that he had originally reported the incident to Mauceri because "the court record didn't substantiate what he (Graseck) said." Graseck insists that it did.

**PLAINTIFF'S EXHIBIT 2**

**LETTER DATED OCTOBER 31, 1972**

**October 31, 1972**

**Howard Finkelstein, Esq.  
President, Board of Directors  
Legal Aid Society of Suffolk County  
456 Griffing Avenue  
Riverhead, New York 11901**

**Dear Mr. Finkelstein:**

It is with regret that I herein submit my resignation from the Criminal Division of the Legal Aid Society to become effective on December 1, 1972. Notice of this decision was given to Mr. John Middlemiss personally on October 24, 1972.

I feel obliged to offer an explanation for the action which I have taken.

Mr. Arthur Graseck, an attorney employed by the Criminal Division of the Legal Aid Society, assigned to the First District Court in Hauppauge was summarily discharged on Friday, October 13, 1972. He was at that time confronted by Mr. Middlemiss with a type-written letter of resignation which Mr. Graseck refused to sign. Thereafter, Mr. Graseck was ad-

vised that his services with Legal Aid were terminated.

Upon being advised what had occurred, I consulted Mr. Middlemiss with regard to the particular acts of conduct which led to the severe action taken in Mr. Graseck's case and urged reconsideration and re-instatement. Based on Mr. Middlemiss' explanation of the situation, I have concluded that Mr. Graseck was fired as a result of certain pressures brought to bear by the administrative judge of the District Court, Angelo Mauceri, J.D.D., and that Mr. Graseck's firing was totally unwarranted under the circumstances and not in the best interest of the Legal Aid Society or the persons whom we represent.

In my opinion, it is of grave importance that the Legal Aid Society, despite its County funding, remain independent and totally un-influenced by any branch of County government, whether it be executive, legislative or judicial. This is no higher standard than that imposed upon any other attorney assigned or retained to represent a client before the bar. As stated in Canon 15 of the New York State Bar Association Canons of Ethics:

"No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client

is entitled to benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

It is apparent from my investigation that Mr. Graseck was discharged for incurring "judicial disfavor". A grave injustice has been committed on Mr. Graseck personally, and of equal importance, this incident can only serve to have an adverse effect on the quality of representation provided those in the County who seek the services of Legal Aid.

I cannot accept this decision. I feel it marks a turning point in the history of the Criminal Division of the Legal Aid Society and under no circumstances do I want to be associated with an organization which has lost sight of its primary purpose and function. I can think of no other single act which will more serve to dampen the zeal and vigor of a Legal Aid Attorney's defense of his client than the threat of dismissal for incurring "judicial disfavor".

I shall remain deeply indebted to the Legal Aid Society for the unique opportunity it has afforded me to grow in knowledge and experience in the practice

is entitled to benefit  
of any and every remedy  
and defense that is  
authorized by the law of  
the land, and he may ex-  
pect his lawyer to assert  
every such remedy or de-  
fense."

It is apparent from my investigation  
that Mr. Grassick was discharged for in-  
curring "judicial disfavor". A grave in-  
justice has been committed on Mr. Grassick  
personally, and of equal importance, this  
incident can only serve to have an adverse  
effect on the quality of representation  
provided those in the County who seek the  
services of legal aid.

I cannot accept this decision. I  
feel it marks a turning point in the his-  
tory of the Criminal Division of the Legal  
Aid Society and under no circumstances  
do I want to be associated with an organ-  
ization which has lost sight of its primary  
purpose and function. I can think of no  
other single act which will more serve  
to dampen the zeal and vigor of a legal  
aid attorney's defense of his client than  
the threat of disbarment for incurring  
"judicial disfavor".

I shall remain deeply indebted to  
the Legal Aid Society for the unique  
opportunity it has afforded me to grow in  
knowledge and experience in the practice

of law.

Sincerely yours,

/S/ E. T. B.

E. Thomas Boyle,  
Attorney in Charge of  
the County Court

ETB:mla  
Copies to:

**DISTRICT COURT OF SUFFOLK COUNTY**

**BOX 1000**

**Veterans Memorial Highway  
Hauppauge, New York 11787**

**HON. ANGELO MAUCERI  
Administrative Judge**

**EDWARD M. BARRY  
Chief Clerk**

**JOSEPH W. VAIL  
Deputy Chief Clerk**

**November 2, 1972**

**PERSONAL & UNOFFICIAL**

**Howard M. Finkelstein, Esq.  
President, Board of Directors  
Legal Aid Society of Suffolk County  
456 Griffing Avenue  
Riverhead, New York 11901**

**Dear Mr. Finkelstein:**

Mr. Middlemiss was kind enough to provide me with a copy of a letter that Mr. E.T.B. sent to you and the Board of Directors of the Legal Aid Society. It is fortunate, or unfortunate, depending on Mr. Boyle's point of view, that he refrained from sending me a copy. I am sending him a copy of this letter, a courtesy he did not afford me which is interesting since he has cloaked himself as a champion of individual rights.

Mr. E.T.B. accuses me, as Administrative Judge, of applying judicial pressure to Mr. Middlemiss which resulted

in your Mr. Grasseck's dismissal. I deny any pressure was applied. I have in the past registered complaints about Mr. Grasseck's conduct in the Court, both with Mr. E.T.B. and Mr. Middlemiss and I can document these complaints as I did with them. I consider the accusations of Mr. E.T.B. a libel of my reputation and integrity, both as an individual and as a member of the judiciary, and I will treat it as such. I request that Mr. E.T.B. document his accusations and that I be provided with a copy of that material so that everyone will have a clear and concise understanding of what he claims occurred.

It is interesting to note, that in Mr. E.T.B.'s zeal and fervor for independence from the judiciary and freedom from judicial disfavor, it did not extend to judicial favor when he was in charge of your bureau in the District Court. If he did, he would have told you of the three occasions he personally asked me, as Administrative Judge, to use my office to intervene on behalf of Legal Aid to the County Executive and members of the Legislature to have your budget passed. Or, when claiming he was short personnel, asked if I as Administrative Judge would allow the assignment of more cases to outside counsel and limit Legal Aid appearances to one criminal part, which I agreed to do. Incidentally, that did not diminish the applications by Legal Aid attorneys for dismissals on the grounds that no trial parts were available. He would

have told you of many occasions in which he asked for and received help to administer his office in this Court. It appears that zeal and fervor, and American ideals is a one way street reserved for Mr. E.T.B., solely for the use of Mr. E.T.B.

His accusation and innuendo and general description of anarchy in the courts is an insult to the integrity and the dedication of all the men and women who practice law in the Legal Aid Society in these courts. I see them in the Court each day and have tried cases with them, their dedication to the rights of their clients has not diminished in any way. I challenge Mr. E.T.B. to specify and document one incident where judicial pressure was brought upon a Legal Aid attorney to dispose of a case in a manner detrimental to his clients. This is pure hogwash and will not stand the light of scrutiny. You are indeed fortunate to have been left with attorneys such as the caliber of the people I speak about who will continue the high ideals of the Bar, notwithstanding Mr. E.T.B.'s unfounded fears.

I want also to state, for no other reason but to show my utter distaste and contempt for this type of attack, that on two occasions earlier this year Mr. E.T.B. told me he was being asked to go into private practice by members of his family and that he just might do that. This alleged incident may have been the catalyst

for him.

I have known Mr. Middlemiss for close to fifteen years, as an attorney and as a man. I found him to be a person of high principle and integrity who cannot be pressured by anyone including Mr. E.T.B. and for Mr. Boyle to make that accusation in light of his performance is untenable.

I respectfully request and would appreciate it, if you would send me any documentary proof that Mr. Boyle can provide of these scurrilous attacks upon my integrity and my position as a member of the judiciary.

Very truly yours,

/S/ Angelo Mauceri

Angelo Mauceri  
Administrative Judge

AM:mk

cc: Edward T. Boyle, Esq.  
Board of Directors

**PLAINTIFF'S EXHIBIT 4**

**LETTER DATED OCTOBER 12, 1972**

**DISTRICT COURT OF SUFFOLK COUNTY**

**BOX 1000**

**VETERANS MEMORIAL HIGHWAY**

**HAUPPAUGE, NEW YORK 11787**

**HON. ANGELO MAUCERI**

**Administrative Judge**

**EDWARD M. BARRY**

**Chief Clerk**

**JOSEPH W. VAIL**

**Deputy Chief Clerk**

**October 12, 1972**

**John F. Middlemiss, Jr., Esq.**  
**Legal Aid Society of Suffolk County**  
**260 W. Main Street**  
**Bay Shore, N. Y. 11706**

**Dear Mr. Middlemiss:**

One of your attorneys, Mr. Grasseck, committed a very serious offense this morning while visiting a prisoner in the cellblock area without the knowledge of the security man. He gave to that prisoner a fountain pen, which could be used as a weapon. This is a serious breach of security and I have issued an order today barring Mr. Grasseck from the cellblock area.

I think that your office should advise this man of the seriousness of his action so that he does not repeat it at any other location.

EXHIBIT 6

LETTER DATED OCTOBER 12, 1972

DISTRICT COURT OF SUFFOLK COUNTY

BOX 1008  
VETERANS MEMORIAL HIGHWAY  
HAUPPAUGE, NEW YORK 11767

HON. ANGELO MAUCERI  
Administrative Judge

JOSEPH W. VALE  
Deputy Chief Clerk

October 12, 1972

John F. Middlemiss, Jr., Esq.  
Legal Aid Society of Suffolk County  
100 W. Main Street  
Bay Shore, N. Y. 11706

Dear Mr. Middlemiss:

One of your attorneys, Mr. Grassano, contacted a very serious offense this morning while visiting a prisoner in the cell block area without the knowledge of the security man. He gave to this prisoner a Remington-Union, which could be used as a weapon. This is a serious breach of security and I have issued an order today barring Mr. Grassano from the cell block area.

I think that your office should also take this man of the seriousness of his action so that he does not repeat it at any other location.

Very truly yours,

/S/ Angelo Mauceri

Angelo Mauceri  
Administrative Judge

AM:mk

cc: Frank Costello  
Legal Aid - Hauppauge

**DEFENDANTS' EXHIBIT EE**

**DOCUMENTS SUPPLIED BY PLAINTIFF AT PERSONNEL  
COMMITTEE MEETING**

To whom it may concern; (handwritten)

I have been an attorney with the Legal Aid Society since January, 1972. During these past ten months I have personally undergone many changes in my attitudes toward criminal justice, my clients and the judges of the First District Court. Many of these changes, which I feel have made me a better attorney, I attribute directly to Thomas Boyle and Arthur Grasek. For this reason as well as others which I shall allude to in this letter I do not feel Arthur Grasek's

I do not believe I have reached the above conclusion by naively seeing only one side of the issue and judging accordingly. Rather, I attribute to myself a measure of objectivity and in this light I am aware of many of the criticisms levelled at Mr. Grasek. A number of these criticisms I feel are valid. Nevertheless, I feel that each and every member of the Legal Aid Society is open to criticism and in several cases this criticism would be much more severe than anything that can be said against Arthur Grasek.

As an example of this I refer to day in the sentencing part of the court. I observed one of our attorneys appear for

sentencing with a client with whom he had not spoken and a legal aid file which apparently had not been read beforehand. When asked by the judge whether he wished to be heard before sentencing the attorney declined the offer and the judge proceeded to sentence the defendant solely on the basis of the probation report which is furnished prior to sentencing. Perhaps, the result in this case would have been no different had it been handled in a more thorough and proper manner but I do think that our clients are entitled to a maximum effort on our part.

The reliance upon other parties, usually the judge, to perform functions which are within the scope of proper defense work is what I consider to be the key malfunction of the Legal Aid Society. The judge is at best a neutral arbiter who must by necessity concern himself with many administrative and judicial functions and cannot be solely concerned with the defendant. That job is left for the defendant's attorney and when he begins to be concerned about the judge's administrative problems, e.g. seeing that the part of the court he is working runs quickly and smoothly, he loses sight of the only duty he must perform in court; the protection of the legal rights of his client. The Legal Aid Attorney is not another arm of the court but rather he must be a separate independent entity.

The best example I can give for what

I mean is myself. When I first began with legal aid I made a special effort to get along well with all the court the judges. Although this is my natural inclination anyway I also felt that this was the best method to aid my clients. This approach has proved valid to a great extent but only when one realizes its limits. Upon reflection I fear that there were numerous instances where I was rushed to make a decision which, given my limited criminal experience I could not make hurriedly. Nevertheless I did make these decisions to the detriment of my client. Arthur Grasek, as a friend and associate, shared with me his views as to the pressures confronted by each legal aid attorney everyday, and in part is responsible for my realizing that to do a good job these pressures must be resisted.

Arthur Grasek was beyond any doubt the most industrious and hard-working attorney employed by legal aid. According to the people who terminated his employment he was also a superior trial attorney. It seems quite exceptional to me to release someone with these credentials.

It is my opinion that men like Arthur Grasek are imperative to the proper functioning of the legal aid society and that unless we intend the Society to stand as a mere token or symbol of a Defense Attorney we cannot afford to let such men leave.

If a meeting is held where views can  
be aired I would appreciate being given an  
opportunity to speak.

Very truly yours,

/S/ George Grun

Defendant's Exhibit EE

Mr. Graseck as a legal aid seemed very much concerned in me & in my case. He wasn't like most legal aids who treat it as just another case. He acted as though he was really there to help me pull through the case & stuck by me as you would find in real lawyers & most likely not a legal aid.

Sincerely,

/S/Vincent McElhiney

Defendants' Exhibit EE

11-12-72

MRS. C. HALL  
29 RALPH AVE  
E. BRENTWOOD - L.I.  
N.Y. 11717 (handwritten)

to Whom it May Concern

In reference of Att. at L. A. Graseck  
who has taken the oath of honesty and  
fairness and to defend innocent people  
and the underprivileged.

Att. A Graseck was only doing what he saw.  
The gentleman only went by the good book  
and was not breaking any law that we could  
see. It was things that he brought out  
in opening.

I remain

/S/ Mrs. C. Hall

Defendants' Exhibit EE

(handwritten)

Centre Island  
Oyster Bay, New York  
November 12, 1972

Dear Sirs:

As a summer intern with the Criminal Division of the Legal Aid Society in 1972, working in the First District Court in Hauppauge, I had ample opportunity to observe Arthur Graseck at work and indeed to work directly with him on a number of matters. He is, in my opinion, one of the most dedicated and hardworking lawyers around. He was impressive to watch and interesting to work with. He fights very hard for his clients and, I honestly believe, he serves them well. Mr. Graseck is extremely thorough and conscientious in preparing his cases and I do not see how any defendant could suffer because of having Mr. Graseck as his attorney. He is an able and concerned advocate and lawyer.

Very truly yours,

/S/Patience Outerbridge

Defendants' Exhibit EE

(handwritten)

Center Island  
Quebec City, New York  
November 12, 1972

Dear Sir:

As a summer intern with the Criminal  
Division of the Legal Aid Society in 1972,  
working in the First District Court in  
Quebec City, I had ample opportunity to  
observe Arthur Graseck at work and indeed  
to work directly with him on a number of  
matters. He is, in my opinion, one of the  
most dedicated and hardworking lawyers  
around. He was instructive to watch and  
interesting to work with. He fights very  
hard for his clients and, I honestly  
believe, he serves them well. Mr. Graseck  
is extremely thorough and conscientious in  
preparing his cases and I do not see how  
any defendant could suffer because of having  
Mr. Graseck as his attorney. He is an able  
and competent advocate and lawyer.

Very truly yours,

Ms. Patricia O'Connell

Defendants' Exhibit EE

(handwritten)

Board of Legal Aid,

In my contact with legal aid, I have  
had several lawyers who have represented  
myself and my son. Only Mr. Graseck has  
really done his job as a lawyer. This I  
feel is what they are for, to represent  
the people, poor people, who can't afford  
a private lawyer.

Mr. Graseck is an excellent lawyer.  
Suffolk County should try and get rid of  
such judges not Mr. Graseck.

Witness: /S/ Mrs. Inez Diamond  
Helen Ackley  
Victor Torres.

Defendants' Exhibit EE

(handwritten)

Daniel Rathjen  
111 W. 1st St.  
Ronkonkoma, N. Y.

Being represented by Mr. Grazeck left  
me in complete trust of the Judicial  
system. To date Mr. Grazeck has been a  
lawyer I will always look up to.

/S/ Daniel Rathjen

11/12/72

witness:

Sue Wasserman  
Charles Powell

Defendants' Exhibit EE

(handwritten)

Attorney Grassick is a very good lawyer  
I would like to see him get his job back.  
Mr. Grassick defends all People equally.  
He treats all People equally.

/S/ Rosetta Wheat  
11 Garden St  
Bay Shore N Y

Defendants' Exhibit EE

(handwritten)

to whom it may concern

I Phillip Barnes do feel that I was defended by attorney Aerathe Graseck to the best that he could and I am very happy with the court decree in my case. I do feel that he should be back to help other people as he help me.

/S/ Phillip Barnes

(handwritten)

To whom it may concern

I had Mr. Graseck for my case. I know he defended me, to the best of his ability.

/S/ Austin Piazza

Defendants' Exhibit EE

(handwritten)

/12/72

I testify that I spoke to a former client of Arthur Graseck. He asked not to have his name used because he has a case coming up that he is afraid will be affected by any action he takes or statements he makes. He did state that he felt Mr. Graseck did a good job for him.

/S/ Sue Wasserman

Witness:

Helen Ackley

Defendants' Exhibit EE

(handwritten)

To who it may concern;

I have been very satisfied with the help and guidance that I received when I had Mr. Gresheck representing me as my attorney on more than one occasion in Hapague court.

I cannot undersand why he has been fired when he was doing a really great service to the people other than myself that could not afford their own attorney and the way he went out of his way to help and understant them and their problems.

Sincerely yours,

/S/Glen Toth

Defendants' Exhibit EE

HOME IMPROVEMENTS By (printed)  
TAYLOR CONST. CO.  
1334 Washington Ave.  
West Islip, N. Y. 11795  
Phone: JU7-5713

(handwritten)

To Whom it may concern:

If Mr. Grassic has indeed been fired, the Legal Aid Society has lost the only member who I met personally) who cared enough to try to help the poor people of this county get the justice they deserve.

I feel a great injustice has been done to this man. He helped my son when we were misled by others. He feels a true sense of responsibility to his people and defends them to the best of his ability. It is rare that we find this honesty and dedication in our system today. I feel only gratitude to this man. Anything I can do further to help him, I will gladly do.

Sincerely,

/S/Mrs. Judith Laznowsky  
1334 Washington Ave  
West Islip, N.Y.

To Whom it may concern;

May 12, 1972

I Rev. Mattie Lee Jones and Mr. Willie Jones, my Husband stands in behalf of MR. ARTHUR GRASECK, to testify to the true fact that he is one of the best Legal-Aid lawyers there is he fought for us when we didn't think that we had a charge because, we thought that all Legial Aid lawyers fought only for the State and the Rich MR. GRASECK fought for the state when he saw sufficient to fight for the state and fought for the Rich when he saw sufficient to fought for them, but meanwhile he didn't forget to do his best for the poor people either he only wanted to know the true fact and nothing else but the true fact and that what he deal with we need more and more lawyers like MR. GRASECK because he is cocen about his client and that more than I can say about any other lawyer. May God Bless and be with him.

/S/ Rev. Mattie Lee Jones.  
Mr. Willie Jones.

Witness: Sue Wasserman-  
Charles Powell

Defendants' Exhibit EE

Defendants' Exhibit EE

Arther Graseck who represented me on March 1972 on the charges of criminal poss. of hupo ins. in my ipinunion he helped far more than any previecs lawyers ive ever had. He just seems to care about the rights of the people, junkies etc. he didn't act as though I was just another case, he seemed to take a interest especially for my rights as I knew hardly anything, about the law. Ive told Mr. Grasack of many times of police bruttally and he wanted to help end this kind of thing that goes on noticed but I was scared of repriseles from the police.

All of the above is true and I hope justise keeps, to rights of the people and especially Mr. Grossack who "i" say rellaely gives a damn and cares, not just for the rich but the less unfornate, who cant help to rely on the legal aid there should Many more like him. Good luck PEACE for all

/S/ Ronald Thomas Hyne  
Nov. 12, 1972

Witness:  
John C. Bouse  
Nov. 12-1972

Defendants' Exhibit EE

Defendants' Exhibit EE

(handwritten)

To Whom it May Concern

I think Mr. Graseck is or was a very good and intelligence lawyer. And I was very satisfied with him and his concern with my sons case. He did a very good job I think and any time I would need a lawyer I will not heistate to call on him at all.

/S/ Alice Plowden

Defendants' Exhibit EE

(handwritten)

To: Board of Directors  
Suffolk County Legal Aid Society

During my tenure with the Suffolk County Legal Aid Society I have grown to like and respect Arthur Grascek. I have found Arthur to be a hardworking, persevering individual dedicated to the service of his client. He has an imaginative and innovative approach to the defense of a client. While some criticize the defense tactics of Mr. Grascek, none criticize his singlemindedness of purpose or unyielding dedication. These same tactics, criticized by some, are appreciated and welcomed by those who believe that a defendant is entitled to the best possible defense. Arthur Grascek always does his personal best for a client.

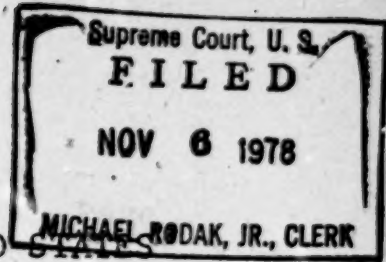
The fact that Arthur Grascek is able and competent in the defense of a client has never been disputed. Arthur is knowledgeable in the law. He transmitted much of this to me in our brief association together. Arthur is also knowledgeable about his clients. He is able to establish a good rapport with the client; one that aids the preparation and defense of any case. What may be more important is that the clients believed in Arthur. To the poor and indigent

stratas of our society it is vital that their lawyer cares about them. These people are bandied about by other institutions in the community. They find in Legal Aid, an institution ready to service their needs. No patronization, no favor, no snobbery. They come to Legal Aid in need of the skill and knowledge that can make the difference between freedom and incarceration. Men like Arthur Grascek can be the difference.

I am informed that Arthur Grascek is being faulted because he gave a pen to a prisoner in the lock-up facility. This is an indiscretion that has been committed by several members of the Society. While not demonstrable of the best judgment, it was always done to further the defense of the client.

I must conclude by saying that the loss of Arthur Grascek's abilities and influences has been felt by attorneys and clients alike. I believe that Arthur Grascek can be a productive and valuable member of any organization to which he directs his energies.

/S/ David Besso



IN THE  
SUPREME COURT OF THE UNITED STATES

December Term, 1978

No. **78-859**

---

ARTHUR V. GRASECK, JR.,  
Plaintiff-Petitioner,

- against -

~~ANGELO MAUCERI, Individually and as  
Administrative Judge of the District Court  
of Suffolk County; et al.,  
Defendants,~~

JOHN F. MIDDLEMISS, JR., Individually and  
as Attorney-in-Charge, Legal Aid Society  
of Suffolk County, New York,  
Defendant-Respondent,

~~RALPH COSTELLO, Individually and as Attorney-  
in-Charge of the District Court Bureau of the  
Criminal Division of the Legal Aid Society  
of Suffolk County, New York,  
Defendant,~~

LEGAL AID SOCIETY of Suffolk County, New  
York,  
Defendant-Respondent.

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A P P E N D I C E S T O  
PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

JAMES C. SCHULTZ  
318 Terry Road  
Hauppauge, New York 11787  
ARTHUR V. GRASECK, JR.  
Of Counsel  
Attorneys for Petitioner

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App. A1

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

No. 920 - September Term, 1977

(Argued March 31, 1978 Decided August 7, 1978)

Docket No. 77-7572

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Arthur V. Graseck, Jr.,  
Plaintiff-Appellant,

v.

Angelo Mauceri, individually and as  
Administrative Judge of the District  
Court of Suffolk County; Edward U.  
Green, Jr., individually and as a  
Judge of the District Court of  
Suffolk County,  
Defendants,

John F. Middlemiss, Jr., individually  
and as Attorney-in-Charge, Legal Aid  
Society of Suffolk County, New York,  
Defendant-Appellee,

Ralph Costello, individually and as  
Attorney-in-Charge of the District  
Court Bureau of the Criminal Division  
of the Legal Aid Society of Suffolk  
County, New York,  
Defendant,

Legal Aid Society of Suffolk County,  
New York,  
Defendant-Appellee.

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App. A2

Before FEINBERG, MANSFIELD and OAKES,  
Circuit Judges.

Appeal from dismissal of a 42 U.S.C.  
§1983 action by the United States District  
Court for the Eastern District of New York,  
Jacob Mishler, Chief Judge, holding inter  
alia that appellees had not acted under color  
of state law, thus depriving the court of  
subject matter jurisdiction.

Affirmed.

Frederick J. Damski, New York  
Civil Liberties Union, Smith-  
town, N.Y. (Harlon L. Dalton,  
Burt Neuborne, Arthur V.  
Graseck, Jr., of counsel),  
for Appellant.

Joseph P. Hoey, Brady, Tarpey,  
Hoey, P.C., New York, N.Y.,  
for Appellees John F. Middlemiss,  
Jr., and Legal Aid Society of  
Suffolk County, New York.

OAKES, Circuit Judge:

This appeal requires us to determine  
whether conduct of a fundamentally private  
institution challenged on constitutional  
grounds constitutes "state action", one of  
the more slippery and troublesome areas of

civil rights litigation. Appellant brought suit under 42 U.S.C. §1983<sup>1/</sup> and its jurisdictional counterpart, 28 U.S.C. §1343, alleging that his discharge by the Legal Aid Society of Suffolk County, New York (the Society), violated the First, Sixth and Fourteenth Amendments. He sought a declaratory judgment, reinstatement and back pay. The United States District Court for the Eastern District of New York, Jacob Mishler, Chief

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1/ It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1983.

Judge, dismissed the complaint<sup>2/</sup> after a bench trial,<sup>3/</sup> holding that appellees had not acted under color of state laws.<sup>4/</sup>

Graseck v. Mauceri, No. 74-C-1157 (E.D.N.Y.,

---

2/ Defendants Middlemiss and Legal Aid were dismissed at this time. Prior to the trial before Chief Judge Mishler, the case was heard by Judge Weinstein, who at the close of that trial dismissed the complaint against defendants Mauceri, Green and Costello. Pursuant to the remaining defendants' request, Judge Weinstein then recused himself. Thereafter the case was reassigned to Chief Judge Mishler. Appellant's appeal is limited to the dismissal of Middlemiss and Legal Aid.

3/ The case was tried de novo before Chief Judge Mishler, although the transcript from the earlier trial, see note 1 supra, was admitted into evidence.

4/ The district court alternatively concluded that the discharge did not abridge any constitutional guarantee. It is unnecessary to address this holding.

dated Oct. 28, 1977). Since we agree that the Society's discharge of appellant did not constitute state action,<sup>5/</sup> we affirm.

# I. FACTS

Arthur Graseck began working for Legal Aid as a staff attorney on July 12, 1971, and was assigned to the District Court Bureau of the Criminal Division in Hauppauge, Long Island. Following a number of incidents detailed below, he was discharged by his supervisor, John Middlemiss,<sup>6/</sup> on October 13, 1972, after he refused to resign.<sup>7/</sup> On

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<sup>5/</sup> The "under color of state law" prerequisite of §1983 is synonymous with the state action requirement of the Fourteenth Amendment as first explicated in Civil Rights Cases, 109 U.S. 3 (1883). Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 n.7 (1970); United States v. Price, 383 U.S. 787, 794 n.7 (1966). The terms are used interchangeably throughout our discussion.

<sup>6/</sup> Middlemiss was attorney-in-charge of Suffolk Legal Aid during Graseck's employment.

<sup>7/</sup> Middlemiss discussed the reasons for the discharge in a 45-minute meeting with appellant. He dismissed Graseck when it became apparent that appellant could not adequately explain the numerous

November 15, the Personnel Committee of the Society held a hearing to review appellant's termination,<sup>8/</sup> particularly appellant's charge that judicial pressure provoked the decision. The committee upheld the dismissal,<sup>9/</sup> as did the Society's board of directors on January 24, 1973.<sup>10/</sup>

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7/ Cont.

incidents culminating in the dismissal. Prior to the meeting, Middlemiss and Ralph Costello, attorney-in-charge of the District Court Bureau for the last six to eight weeks of appellant's employment, had agreed upon the need to dismiss Graseck.

8/ The meeting was divided into three stages. The first was a session open to the public during which civil rights and social service organizations and former clients of appellant spoke on his behalf. A closed session was then conducted with the committee's five members, Costello, Middlemiss, appellant and Thomas Boyle, attorney-in-charge of the District Court Bureau during most of appellant's employment. In this private meeting the four attorneys presented their positions, appellant submitted exhibits, and Boyle spoke on Graseck's behalf.

9/ The vote was four to one.

The district court found that appellant was discharged due to his inability to work with colleagues and to follow established rules, his repeated exercise of poor judgment, and his continual absence from assigned areas. In other words, Graseck was asked to resign because his conduct over the course of the year disrupted the efficient operation of the Society. These were substantially the reasons proffered by Middlemiss and Costello.<sup>11/</sup> The events which culminated in the dismissal must be explored at some length in order fully to appreciate Chief Judge Mishler's conclusion that the discharge, far from being a reaction to judicial pressure resulted from the independent managerial decision of the Society.

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<sup>10/</sup> Appellant was neither informed of nor present at this meeting.

<sup>11/</sup> He replaced Thomas Boyle as attorney-in-charge of the District Court Bureau after Boyle transferred to the Riverhead office.

According to the district court, Graseck's inability to work with other staff attorneys stemmed from his repeated interference with their clients. For example, a heated argument between appellant and a Ms. Mottenburg ensued after he took her client's file without informing her. When the case was called, no one answered and a bench warrant was issued for the client's arrest. Similarly, on at least three other occasions, without consulting assigned counsel, he induced their clients either not to plead guilty after a contrary decision had been made or to withdraw their pleas. This conduct, however much it may have aided the individual client, obviously created tension and friction between appellant and his co-workers.

The district court referred to three incidents to support its finding that "(p)laintiff's overwhelming desire to protect and defend his assigned clients often led him to exercise poor judgment and to deviate from established standards of conduct. This

weakness particularly emerged in his relations with the judges of the District Court."

Graseck v. Mauceri, supra, No. 74-C-1157, at 8. Two of the incidents, involving confrontations with state judges, form the basis of appellant's assertion that his dismissal directly resulted from the Society's inability to withstand the pressure imposed by these judges; and hence was "state action." The first occurred in February, 1972. After a presiding judge in a criminal trial denied appellant's request for production of certain police records, Judge Mauceri, the administrative judge of the district court, denied a subpoena duces tecum. Appellant then unsuccessfully presented the subpoena to a third judge, without disclosing the previous denials. Thereafter Graseck, again without revealing the previous denials, asked another staff attorney to submit the subpoena to a fourth judge, who signed the subpoena. Upon discovering what he considered to be improper

conduct, Judge Mauceri suggested to Thomas Boyle, the attorney-in-charge of the District Court Bureau at that time, that Graseck be transferred from the Bureau. Boyle consulted with Middlemiss, and they agreed that a transfer "would constitute a submission by the Society to the authority of the court in a matter which solely concerned the Society." Id. at 9-10. Accordingly, they did not succumb to the judge's suggestion. Shortly thereafter, Judge Mauceri explained in a transcribed meeting with Boyle and appellant:

As far as your practice, I don't want you to limit yourself or your ability to defend the clients the way you see fit. I don't intend to do that but you have to do it within the purview of the rules and regulations of ethics. Every lawyer is bound by it, not only you but everyone, whether it be a private attorney or one working for the State as you are.

The judge warned appellant that he would refer the matter to the Character Committee of the Bar Association if Graseck engaged in similar conduct in the future. He ended the

App. All

meeting on an optimistic note, however, stating: "I hope this is the end of it".

The second run-in with the judiciary occurred in late September, 1972, when appellant moved to dismiss a misdemeanor case for failure to prosecute. In the affirmation accompanying the motion, he accused Judge Green of being an agent of the district attorney, endeavoring to accommodate the People's desires at the cost of the defendant's constitutional and statutory rights. When the judge learned of the charges he requested a conference with appellant and Costello.<sup>12/</sup> There is conflicting testimony as to the message Judge Green conveyed at the meeting. According to appellant, the judge banned him from further appearances in his courtroom. Judge Green recalled having instructed

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<sup>12/</sup> After the meeting, Costello criticized appellant for the language used in the affirmation and reported the incident to Middlemiss.

appellant to ask for the former's disqualification in any future case in which appellant feared bias. That Graseck did appear before the judge subsequent to the conference was supported by Judge Green's testimony and documentary evidence. Judge Green also testified that he never intended to prompt Graseck's dismissal by requesting the conference. The district court accepted Judge Green's version of the discussion. The evidence supports this finding.

The third episode which, according to the district court, revealed appellant's poor judgment and was a factor underlying Middlemiss's decision to seek Graseck's dismissal, involved Graseck's attempt to bring and Article 78 proceeding against a trial judge. His purpose was to compel the judge to indicate in the records that a trial had been adjourned because of the prosecutor's lack of readiness rather than court congestion. After Graseck filed the papers at the Supreme Court in

Riverhead, and an official there informed Middlemiss of Graseck's action, Middlemiss ordered appellant to stop pursuit of the action and to return to the district court. Evidently, Middlemiss was irritated by Graseck's recurring crusades for his clients which often precluded his availability for more routine matters.

Chief Judge Mishler found three additional incidents revelatory of appellant's inability to follow established rules. The most critical, for purposes of deciding the state action issue, involved a second confrontation with Judge Mauceri. On October 12, 1972, appellant left a ball point pen with a client during a visit in the holding pen. Upon discovery, a guard prohibited appellant from entering the holding pen and informed Judge Mauceri of the security considerations involved. Whether the security personnel had previously given instructions never to leave such instruments with detainees because of their potential use

as weapons is in dispute. Judge Mauceri issued an order barring Graseck from entering the holding pen, telephoned Middlemiss to apprise him of the order and then sent Middlemiss written confirmation of his decision.<sup>13/</sup> What was said during the telephone conversation is also disputed. Boyle testified<sup>14/</sup> that Middlemiss told him that Mauceri had stated, "You have got to get this guy out of my court." Trial Transcript at 1-70. Middlemiss and Mauceri denied that

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13/ The letter stated:

One of your attorneys, Mr. Grasseck sic, committed a very serious offense this morning while visiting a prisoner in the cellblock without the knowledge of the security man. He gave to that prisoner a fountain pen, which could be used as a weapon. This is a serious breach of security and I have issued an order today barring Mr. Grasseck from the cellblock area.

I think that your office should advise this man of the seriousness of his action so that he does not repeat it at any other location.

Letter from Administrative Judge Angelo Mauceri to John F. Middlemiss, Jr. (Oct. 12, 1972).

any such statement was made. Judge Mauceri also denied having intended to pressure the Society into dismissing appellant or even having contemplated the possibility of dismissal.<sup>15/</sup>

Judge Mauceri was not the only person who objected to appellant's practices. Appellant was prohibited by an assistant district attorney from entering the district attorney's office without accompaniment after Graseck was discovered one day rummaging through the office's files after 5:00 p.m. And Middlemiss revealed that appellant had loaned to outsiders minutes of Legal Aid cases on several occasions without the requisite approval.

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14/ Boyle resigned from Suffolk Legal Aid in protest over Graseck's dismissal.

15/ To Middlemiss's knowledge, Graseck's was the first and only dismissal of a staff attorney in the Society's history.

The district court lastly found that complaints received by Costello almost on a daily basis about Graseck's absence from his assigned part played a role in the Society's decision to seek his removal. Although these continual absences were caused by appellant's good faith attempts to aid his clients, they disrupted the organizational framework of the Society and often shifted appellant's workload onto the shoulders of his already overburdened colleagues.

The district court's findings regarding the events underlying the dismissal decision are not clearly erroneous and find support in the record. The question presented for review then, simply stated, is whether the judicial criticism of appellant together with the working relationship between the Society and the state judges constituted sufficient state involvement in the dismissal as to constitute "state action."

## II. DISCUSSION

A prerequisite for any relief under Section 1983, of course, is that the defendant have acted under color of state law. See notes 1 & 5 supra. There is no dispute over the Society's fundamentally private nature.<sup>16/</sup> Nevertheless, appellant asserts that the dismissal amounted to state action because (1) the private entity conspired with state officials to perform an unconstitutional act.

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<sup>16/</sup> The institution exists independent of any state or local regulatory authority. It is a private membership corporation organized under New York corporation law. Pursuant to its bylaws, a board of directors elected by the Society's general members manages the organization. No member of the board is a public official. The attorney-in-charge has authority for the supervision of the branch offices, including the hiring and firing of attorneys, subject to the control of the board.

The Society provides legal services to indigent criminal defendants under a contract with the County of Suffolk, renewed on an annual basis. This contract was made pursuant to New York state law which authorizes the County to utilize "public defender" or "private legal aid" systems. It provides in pertinent part:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970); United States v. Price, 383 U.S. 787, 794 (1966), and (2) the State, through its judicial officers' conduct and its administrative and financial support of the Society,

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16/ Cont.

The governing body of each county . . . shall place in operation throughout the county. . . a plan for providing counsel to persons charged with a crime. . . who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

2. (R)epresentation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel. . .

3. Representation by counsel furnished pursuant to a plan of a bar association. . .

4. Representation according to a plan containing a combination of any of the foregoing. . . .

N.Y. County Law, art. 18-B, §722 (McKinney Supp. 1977-78) (emphasis added).

"significantly involved itself" in the administration of the private institution, see Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967), and developed a "sympiotic relationship" with the private organization. See Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

We believe that Lefcourt v. Legal Aid Society, 445 F. 2d 1150 (2d Cir. 1971), is dispositive of most of the theories advanced by appellant and that the additional facts extant in this case do not compel a contrary result. In Lefcourt, a panel of this court held that the dismissal of a legal aid attorney by the Legal Aid Society of the City of New York was not performed under color of state law, notwithstanding the receipt of substantial government funds by the Society.<sup>17/</sup> The lack

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<sup>17/</sup> Chief Judge Mishler was aware of the more rigorous scrutiny imposed when challenged activity does not involve

of governmental control over or interference with the Society's affairs was deemed

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17/ Cont.

racial discrimination. See Lefcourt v. Legal Aid Soc'y, 445 F. 2d 1150, 1155 n.6 (2d Cir. 1971). We agree that the less stringent state action standard utilized in racial discrimination cases is inapplicable here. Schlein v. Milford Hosp., Inc., 561 F. 2d 427, 428 n.5 (2d Cir. 1977) (per curiam); Taylor v. Consol. Edison Co. of New York, Inc., 552 F. 2d 39, 42-43 (2d Cir. 1977); Jackson v. Statler Foundation, 496 F. 2d 623, 629, 635 (2d Cir. 1974), cert. denied, 420 U.S. 927 (1975). But see, e.g., Downs v. Sawtelle, No. 77-1260, slip op. at 7-8 n.5 (1st Cir., Mar. 30, 1978) (urging that "fundamental rights" should receive identical scrutiny).

pivotal.<sup>18/</sup> Id. at 1155.

The similarities between Lefcourt and the facts before us are, not surprisingly, striking. The bylaws of both societies are almost identical, see note 16 supra, their respective

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<sup>18/</sup> The court in Lefcourt also rejected the public function theory of state action holding:

Although the Society by contract has undertaken to make available to indigents legal services which otherwise governmental agencies might have to assume, its history constitution, by-laws, organization and management definitely establish that it is a private institution in no manner under State of City supervision or control.

Lefcourt v. Legal Aid Soc'y, supra, 445 F. 2d at 1156-57 (footnote omitted). See also Flag Bros., Inc. v. Brooks, 46 U.S.L.W. 4438, 4440-42 (U.S. May 15, 1978) (rejecting public function doctrine of state action where challenged private conduct is not an exclusive prerogative of the State); but see id. at 4442 (refusing to consider whether state action is implicated by delegation to private parties of functions traditionally more exclusive than dispute resolution, such as education).

contracts were made pursuant to the same New York law requiring the State to implement a plan for furnishing counsel to indigent defendants, see Lefcourt v. Legal Aid Society, supra, 445 F. 2d at 1155, they both receive substantial government funding (although the Society in Lefcourt evidently received some funds for its criminal division from private sources,<sup>19/</sup> they are both housed in government buildings, and, most importantly, there is no formal mechanism through which any government entity can exercise control or supervision over the internal operations of the societies.

See id.

Thus far, Lefcourt supports if not compels a finding of no state action. Its reasoning applies with equal force to the instant facts:

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<sup>19/</sup> The criminal division of the Society in the case before us is entirely funded by the Suffolk County Legislature.

(I)t cannot be said that the Society acts under color of State law by virtue of the financial and other benefits (20/) which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs.

Id. (footnote omitted).

The crucial question is whether the actions of Judges Mauceri and Green, and in particular

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20/ Appellant lists as additional indicia of state action Judge Mauceri's request for funds for the Society in his 1971 annual address to the County Legislature, his having provided the Society with a Spanish-speaking interpreter, and his adjustment of certain court procedures to accomodate the Society when its case-load became excessive. Such minimal courtesies to ensure the continued efficient operation of the Society and concomitantly of the criminal courts are hardly grounds for distinguishing this case from Lefcourt. Moreover, as is true of the factors analogous to both cases, there is no relationship or nexus between state involvement of this sort and the challenged dismissal. See note 22 infra.

their communications with Graseck's supervisors, provide sufficient involvement in the discharge to distinguish Lefcourt and to render the conduct of the Society that of the State. Since the judges in no sense actively participated in the decision-making process itself, it must be determined whether they encouraged or coerced the dismissal, see, e.g., Flag Brothers, Inc. v. Brooks, 46 U.S.L.W. 4438, 4442 (U.S. May 15, 1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 356 n.15, 357 & n.17 (1974); Moose Lodge No. 107 v. Irvis, supra, 407 U.S. at 173, 176-77; Schlein v. Milford Hospital, Inc., 561 F. 2d 427, 428-29 (2d Cir. 1977) (per curiam); Taylor v. Consolidated Edison Co. of New York, Inc., 552 F. 2d 39, 43, 46 (2d Cir. 1977); Note, State Action: Theories for Applying Constitutional Restrictions to Private Activities, 74 Colum. L. Rev. 656, 680, 682-83 (1974). And even if that question were answered affirmatively, the question would

remain whether the discharge was in response to their requests. See Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064, 1136-38, 1140 (C.D. Cal. 1976) (especially discussion of prior state action cases); cf. Herrmann v. Moore, No. 77-6184, slip op. 3005, at 3011-1 (2d Cir. May 10, 1978) (no "deprivation" under 42 U.S.C. §1983 where trial continued despite alleged attempts by state court judge to impede the action).

Appellant asserts that his discharge was in direct response to the judicial pressure imposed on the Society by Judges Green and Mauceri. We are unpersuaded by Graseck's argument, as were the courts below. Judge Weinstein, in dismissing the complaint against the state judges, see notes 2-3 supra, found totally lacking any evidence that they encouraged or even desired the discharge:

There isn't the slightest direct evidence that these judges asked for the resignation or firing of this plaintiff or that they desired it. . . I don't see how there's any basis for liability here in the judges. . .

There simply has been no case made out. The only thing we have is the hearsay and surmise of the plaintiff, which certainly doesn't suffice.

Trial Transcript at 268 (Weinstein trial)  
(Nov. 26, 1976).<sup>21/</sup> Chief Judge Mishler concluded in a similar vein that "their participation was chiefly confined to criticizing

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<sup>21/</sup> We note that at the conclusion of the initial trial Judge Weinstein found the evidence too indirect to justify retention of the state judges as parties. He was, however, not discussing their involvement with the Society for purposes of establishing state action. In fact, Judge Weinstein denied a motion to dismiss for lack of jurisdiction, finding state action from the close working relationship between the District Court of Suffolk County and the Society. Trial Transcript at 269 (Weinstein trial) (Nov. 26, 1976).

plaintiff for his errors of judgment and his misdeeds, and to reporting these incidents to his superiors," Graseck v. Mauceri, supra, No. 74-C1157, at 24; and that "the decision to dismiss (appellant) resulted from the independent determination of the Society and was grounded upon (appellant's) entire course of conduct during the twelve month period of his employment at the district Court Bureau." Id. at 25 (emphasis in original).

State involvement in any manner in the activities of a private institution does not necessarily establish state action. Its existence depends on "whether there is a sufficiently close nexus between the State and the challenged action of the(private) entity so that the action of the latter may be fairly treated as that of the State itself". Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 351; <sup>22/</sup> Moose Lodge No. 107 v. Irvis,

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<sup>22/</sup> The Supreme Court has not yet addressed the extent to which the

supra, 407 U.S. at 176. In the typical case, the question posed is relatively simple: was the state "involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff

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22/ Cont.

"sybiotic relationship" analysis of Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), survives Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). We have held that the relationship between the state and a private entity may be so extensive that the actions of the ostensibly private institution will fall within the ambit of state action, even in the absence of direct state involvement in the challenged activity. Holodnak v. Avco Corp., 514 F. 2d 285, 288 (2d Cir.), cert. denied, 423 U.S. 892 (1975). Accord, e.g., Downs v. Sawtelle, supra, No. 77-1260, at 12-13; Chalfant v. Wilmington Inst., No. 76-2132, slip op. at 10-13 (3rd Cir. Feb. 27, 1978) (en banc); Braden v. Univ. of Pittsburgh, 552 F. 2d 948, 956-58 (3rd Cir. 1977) (en banc); Weise v. Syracuse Univ., 522 F. 2d 397, 407 n.12 (2d Cir. 1975). Not unmindful of the close working relationship here, we believe that the absence of governmental participation, let alone of "substantial" participation, in the Society's general management and internal operations precludes a finding in this case of the degree of pervasive

but with the activity that caused the injury(?)"  
Powe v. Miles, 407 F. 2d 73, 81 (2d Cir. 1968)  
 (emphasis added). The instant case presents  
 a slightly different inquiry, however, because  
 the conflicts between Graseck and the judges  
 undisputedly were among the factors which  
 prompted the Society's decision to discharge  
 appellant. Thus, there is an attenuated  
 causal connection between the conduct of the  
 judges and the action taken by the Society  
 that normally does not exist in the regulatory  
 context. It still must be determined, however,

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22/ Cont.

interdependence or partnership  
 contemplated by Burton. See Braden  
v. Univ. of Pittsburgh, supra, 552  
 F. 2d at 959-61; Jackson v. Statler  
Foundation, supra, 496 F. 2d at 635;  
cf. Schlein v. Milford Hosp., Inc.,  
supra, 561 F. 2d at 428-29 (holding  
 no state action because of absence  
 of a nexus without discussing symbiotic  
 relationship analysis, where the state  
 played no part in either formulating  
 hiring procedures of hospital or  
 applying them to appellant).

whether the state judges placed their "imprimatur" on the Society's conduct, Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 357, by expressing their unhappiness and requesting the Society to control its attorney. In the words of the Supreme Court, "where the (state) has not put its own weight on the side of the proposed practice by ordering it, . . . a practice initiated by the (private entity) and approved by the (state is not transmuted) into 'state action.'" Id. at 357. But where it has done so, Jackson seems to imply, there perhaps may be state action. Cf. Note, supra, 74 Colum. L. Rev. at 656, 582 n. 166, 683 (relying on Second Circuit cases for the proposition that state action "does not require that government command, regulate or influence the challenged activity. It is enough that government influence or encourage private persons to perform functions or implement policies in the course of which a challenged activity

occurred." (footnote omitted) ).

Our review of the three incidents deemed crucial by appellant convinces us that the limited nature of the judges' conduct complained of precludes a finding of state action. The chain of events following Judge Mauceri's communications after the subpoena incident is quite revelatory of his lack of influence over both the Society's internal operations in general and its ultimate decision to discharge Graseck. Boyle and Middlemiss adamantly refused to transfer appellant, contrary to the judge's suggestion. From the transcript of the subsequent meeting, it is apparent that not only had Judge Mauceri by this time acquiesced in the Society's decision, but he was hopeful of a good working relationship in the future. The judge did not again have contact with the Society concerning Graseck until the pen incident, some eight months later. Thus, the evidence refutes the notion that Graseck's discharge

was in response to Judge Mauceri's transfer suggestion. Moreover, there is no indication that the judge directly or indirectly encouraged the dismissal simply by bringing to the attention of the Society with the aim of arresting similar incidents conduct of one of its staff thought by the judge to be improper. See text accompanying notes 23-24 infra.

Appellant's attempt to attribute his dismissal to prompting by Judge Green fares no better. There is no evidence that the judge ever requested, suggested or desired the Society's course of action. He was solely controlling the administration of his court. We do not doubt that the friction between the judge and appellant could have impeded appellant's ability meaningfully to function for the Society; obviously, the Society would not have discounted this concern when it reviewed appellant's past and future utility. But much more in the way of state

involvement is necessary to characterize private conduct as that of the State. "(T)he state action, not the private action, must be the subject of the complaint." Powe v. Miles, supra, 407 F. 2d at 81. See Taylor v. Consolidated Edison Co. of New York, Inc., supra, 552 F. 2d at 43 ("The relationship of the state's involvement to the conduct forming the basis of the constitutional claim is likewise of prime importance. Where the 'private' party is engaged in the alleged deprivation at the state's express direction, the actor may well be subjected to constitutional limitations."). We are unwilling to infer judicial fostering of the dismissal simply because a judicial officer happened to be involved in one of numerous incidents which reflected appellant's inability to work compatibly with the people around him. See text accompanying notes 23-24 infra.

The lack of state direction is further elucidated by the circumstances surrounding

Judge Mauceri's order barring Graseck from the holding pen. Undisputedly, appellant's diminished utility to the Society resulting from the order was one reason for his dismissal.<sup>23/</sup> We reiterate, however, that it is not the effect alone that government conduct has on private actions which establishes the governmental character of the private action. Rather, it is the degree of government influence and control over the private entity, and in particular over the decision itself that is determinative.<sup>24/</sup> Judge Mauceri's

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<sup>23/</sup> Middlemiss testified that his decision to discharge appellant crystalized after the pen incident not only because of Graseck's impaired utility to the Society stemming from Judge Mauceri's order, but also because of the extreme impropriety and seriousness of Graseck's conduct.

<sup>24/</sup> Appellant's reliance on Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), is unavailing. Judge Ferguson there stated, after a thorough review of the state action doctrine, that mere governmental encouragement of a programming policy ultimately adopted

order was made to promote the orderly functioning of the criminal court system pursuant to his duties as administrative judge. We refuse to read into this action any other motive, nor could we do so even if willing, given our appellate role. Middlemiss, after discussion with Costello, determined that appellant's discharge was in the best interests of the Society. That the decision was partially based on prior clashes with two state court judges and a desire to promote a good working relationship with these judges (as well as

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24/ Cont.

by the major networks would not suffice to invoke the doctrine. 423 F. Supp. at 1135-40. The court found state action extant due to the FCC's exertion of significant pressure to adopt the policy accompanied by threats of severe sanctions. Id. at 140-43. See Kuczo v. Western Connecticut Broadcasting Co., 566 F. 2d 384, 387-88 (2d Cir. 1977). In other words, the private decision was not an independent one. Here, by contrast, evidence of active encouragement is meager; evidence of pressure to discharge appellant is totally lacking.

between the staff attorneys) does not shift responsibility for an internal decision generated by an autonomous organization into state action. To characterize the one disputed statement of Judge Mauceri, "to get this guy out of my court," see text accompanying notes 14-15 supra, as having significantly influenced the dismissal distorts the significance of the statement, made in a moment of anger, as well as the record, brimming with additional incidents, out of all proportion. Judge Mauceri's expression of his displeasure with appellant's behavior was a feeling evidently not unique to the judges. Given the continuing working relationship between the judges and the Society, his attempt to minimize strain through discussion is perfectly understandable. In the final analysis we must, in the light of the district court's findings, view Judge Mauceri's possible request for appellant's removal as no more than an unfortunate expression of outrage which the

Society never interpreted as a demand for dismissal.

In sum, we agree with the district court that the Society initiated the dismissal based on its own independent evaluation of its needs, rather than at the behest of the state judges.<sup>25/</sup> See Taylor v. Consolidated Edison Co. of New York, Inc., supra, 552 F. 2d at 45. Official "involvement," if it can even be characterized as such, merely amounted to the judges' contribution of material facts, their reactions thereto, and their exercise of supervisory powers over

25/

To the extent that the conspiracy theory of state action utilized in Adickes v. S.H.Kress & Co., supra, is distinguishable from the coercion or encouragement theory discussed above, compare Writers Guild of America, West, Inc. v. FCC, supra, 423 F. Supp. at 1138-38 n. 129 (noting a possible difference), with Flag Bros., Inc. v. Brooks, supra, 46 U.S.L.W. at 4442 (implying no difference), it is inapplicable here. The state judges' lack of encouragement to dismiss appellant and lack of intent in this regard belie the existence of a conspiracy.

their courts. There being no official intrusion into the personnel policies of the Society, its management decision may not be attributed to the State.

Judgment affirmed.

App. B1(a)

MEMORANDUM OF DECISION AND ORDER

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

ARTHUR V. GRISECK, JR.,

Plaintiff,

-against-

ANGELO MAUCERI, individually and as  
Administrative Judge of the District  
Court of Suffolk County; EDWARD U.  
GREEN, JR., individually and as a  
Judge of the District Court of  
Suffolk County; JOHN F. MIDDLEMISS,  
JR., individually and as Attorney-  
in-Charge, Legal Aid Society of  
Suffolk County, New York; RAPLH  
COSTELLO, individually and as  
Attorney-in-Charge of the District  
Court Bureau of the Criminal Divi-  
sion of the Legal Aid Society of  
Suffolk County, New York; LEGAL AID  
SOCIETY OF SUFFOLK COUNTY, NEW YORK,

Defendants.

No. 74-C-1157

MEMORANDUM OF DECISION AND ORDER  
App. B1(b)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

ARTHUR V. GRASECK, JR.,  
Plaintiff,

-against-

ANGELO MAUCERI, individually,  
etc., EDWARD U. GREEN, JR.,  
individually, etc., JOHN F.  
MIDDLEMISS, JR., individually,  
etc., RALPH COSTELLO, indivi-  
dually, etc., LEGAL AID SOCIETY  
OF SUFFOLK COUNTY, NEW YORK  
and ARTHUR V. GRASECK,  
Defendants.

App. B1(b)  
MEMORANDUM OF DECISION AND ORDER

-----X

RESERVE INSURANCE COMPANY,

Plaintiff,

-against-

ANGELO MAUCERI, individually,  
etc., EDWARD U. GREEN, JR.,  
individually, etc., JOHN F.  
MIDDLEMISS, JR., individually,  
etc., RALPH COSTELLO, indivi-  
dually, etc., LEGAL AID SOCIETY  
OF SUFFOLK COUNTY, NEW YORK  
and ARTHUR V. GRASECK,

Defendants.

Memorandum of  
Decision and  
Order  
(Consolidated  
Actions)

No. 74-C-1559

October 28, 1977

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App. B2

Memorandum of Decision and Order

A P P E A R A N C E S :

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Jr., Ralph Costello and Legal Aid Society  
of Suffolk County, New York

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New York, New York 10038

by: JOSEPH P. HOEY, ESQ.-Of Counsel

MISHLER, CH. J.

Plaintiff brings this action to  
redress his alleged improper discharge as a  
staff attorney with the Legal Aid Society of  
Suffolk County, New York ("the Society").

App. B3

Memorandum of Decision and Order

He contends that defendants, acting under color of state law, terminated his employment in violation of (i) substantive rights protected by the first, sixth and fourteenth amendments to the United States Constitution and (ii) procedural rights protected by the fourteenth amendment to the United States Constitution. More specifically, plaintiff argues that his dismissal was prompted by the exercise of free speech and the assertion of his clients' rights to a fair trial and to effective legal representation. Plaintiff also contends that the reasons proffered by defendants for his termination are unconstitutionally arbitrary and that the dismissal was motivated by judicial pressure. Finally, plaintiff asserts that defendants' failure to afford him written notice of the basis of his dismissal and to factually investigate these grounds violated the due process clause of the fourteenth amendment.

App. B4  
Memorandum of Decision and Order

Plaintiff bases his claim upon  
42 U.S.C. §1983<sup>/1</sup> and upon the first, sixth and  
fourteenth amendments to the United States  
Constitution. Thus, jurisdiction is conferred  
by the federal question statute, 28 U.S.C.  
§1331(a), and 28 U.S.C. §1343(3) and (4).  
Plaintiff seeks a declaratory judgment  
stating that his dismissal was unconstitutional;  
an order directing his reinstatement with the  
Society; and back pay commencing from the date  
of his discharge.

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/1 42 U.S.C. §1983 provides that:

Every person who, under color of any  
statute, ordinance, regulation, custom,  
or usage, of any State or Territory, sub-  
jects, or causes to be subjected, any  
citizen of the United States or other  
person within the jurisdiction thereof  
to the deprivation of any rights, privi-  
leges, or immunities secured by the  
Constitution and laws, shall be liable  
to the party injured in an action at law,  
suit in equity, or other proper proceed-  
ing for redress.

App. B5  
Memorandum of Decision and Order

Defendants take the position that the Society is a private entity whose actions were not taken under color of state law and therefore is not subject to jurisdiction under 42 U.S.C. §1983. Furthermore, defendants argue that even if the Society is deemed an instrumentality of the state (i) they did not deprive plaintiff of any constitutional rights and (ii) plaintiff was an employee dischargeable at will who was dismissed for good cause.

The case was tried before the undersigned.<sup>/2</sup>

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<sup>/2</sup> Approximately six months before the case was heard by this court, the action was fully tried by Judge Weinstein. At the close of trial, Judge Weinstein granted motions to dismiss by defendants Mauceri, Green and Costello; denied similar motions by defendants Middlemiss and the Society; and reserved decision on all other issues. Thereafter, Judge Weinstein recused himself and the case was reassigned to the undersigned. At retrial, the parties agreed to incorporate the transcripts of the Weinstein trial as evidence and were given the opportunity to call any witnesses for additional examination.

## Memorandum of Decision and Order

FINDINGS OF FACT

On July 12, 1971, plaintiff began working for the Society as a staff attorney in its Criminal Division. In October, he was assigned to the District Court Bureau in Hauppauge, Long Island<sup>/3</sup>, where he remained until his dismissal approximately one year later. E. Thomas Boyle, Attorney-in-Charge of the District Court Bureau from October 1971 to August 1972, served as plaintiff's immediate supervisor. In August 1972, Ralph Costello replaced Boyle as Attorney-in-Charge of the District Court Bureau and thus supervised plaintiff during the final two months of his

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<sup>/3</sup> The Criminal Division of the Society has two offices, one in Hauppauge where the District Court is located (this office is referred to as the District Court Bureau) and one in Riverhead where the County Court and the Supreme Court are located. The District Court Bureau provides representation to indigents prosecuted in the District Court on misdemeanor charges and also provides representation to indigents at felony examinations. The District Court Bureau is physically situated in the courthouse itself.

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Memorandum of Decision and Order

FINDINGS OF FACT

employment.

On October 13, 1972, defendant John F. Middlemiss, Jr., Attorney-in-Charge of the Society, met with plaintiff and Costello. Defendant Middlemiss asked plaintiff to resign, setting forth the grounds for the request. When plaintiff refused to resign -- stating that he needed the weekend to consider it -- defendant Middlemiss dismissed him.

A few days later, Boyle met with defendant Middlemiss to protest plaintiff's discharge and to urge his reinstatement. When defendant Middlemiss declined to rehire plaintiff, Boyle resigned. In his letter of resignation dated October 31, 1972, Boyle accused the Society of discharging plaintiff for incurring judicial disfavor. He stated that "...Mr. Graseck was fired as a result of certain pressures brought to bear by the administrative judge of the District Court, Angelo Mauceri, J.D.D., and that Mr. Graseck's firing was

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Memorandum of Decision and Order

totally unwarranted under the circumstances. .  
." (Plaintiff's Exhibit 2, p.1).

On November 15, the Personnel Committee of the Society held a hearing to review plaintiff's termination, particularly the charge levelled against the Society by plaintiff and Boyle that judicial pressure provoked the decision. Plaintiff was notified of the meeting, but he did not receive a written statement of the grounds for his dismissal. The meeting was divided into two parts; during the first half, which was open to the public, former clients of plaintiff testified on his behalf. Thereafter, the balance of the meeting was conducted in private among plaintiff, Boyle, defendant Middlemiss, Costello and the five members of the Personnel Committee. The four attorneys were afforded full opportunity to present their "cases" to the Committee: plaintiff expressed his view as to why he was discharged and submitted exhibits in support

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Memorandum of Decision and Order

thereof; Boyle spoke on plaintiff's behalf; and defendant Middlemiss and Costello summarized their reasons for plaintiff's removal. At the conclusion of the hearing, the Personnel Committee, on the basis of the evidence presented, voted four to one to uphold the decision of defendant Middlemiss to dismiss plaintiff. Plaintiff was apprised of the Committee's affirmation the day of the hearing. On January 24, 1973, the Board of Directors of the Society reviewed plaintiff's dismissal and sustained the decision of the Personnel Committee. Plaintiff was neither informed of, nor present at, this meeting.

A barrage of oral and documentary evidence reflecting plaintiff's employment record, including the reasons for his termination, was presented at trial. A careful review of the record discloses that plaintiff was discharged for a manifest inability to function within the organizational framework of the

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Memorandum of Decision and Order

Society. The evidence amply demonstrates that plaintiff was unable to work with colleagues, to adhere to elementary rules and procedures of the Society and the District Court; and to exercise the degree of sound judgment that is necessary when presenting a case before the court. During the twelve month period of his employment at the District Court Bureau, plaintiff was unwilling to work as a member of a team but rather consistently performed according to his personal concept of his position. The incidents which culminated in plaintiff's dismissal might, when viewed singly, seem insignificant; however, when regarded in the aggregate, they unequivocally support the Society's contention that plaintiff's conduct impeded its proper functioning and reflected adversely on its good name. The summary below constitutes our findings of fact as to the reasons for plaintiff's discharge:

INABILITY TO WORK WITH COLLEAGUES

The friction between plaintiff and his coworkers was not the product of personality conflicts, but rather resulted from plaintiff's repeated interference with the clients of his fellow staff attorneys. These encroachments not only angered plaintiff's colleagues, but also hindered the smooth operations of the Society and the courthouse.

(a) The Mottenburg Incident

Without informing Mrs. Mottenburg, plaintiff took one of her client's files so he could discuss the case with the client. While advising her client outside the courtroom, the case was called, nobody answered, and a bench warrant was issued for the client's arrest. This incident led to a heated argument between plaintiff and Mrs. Mottenburg.

(b) The Kuzmier, Lardner and Elliott Incidents

After Mr. Kuzmier negotiated a disposition with the District Attorney and

Memorandum of Decision and Order

obtained the consent of the client as well as the judge, the client subsequently refused to plead guilty to a violation. It seems that plaintiff, without the knowledge or consent of Mr. Kuzmier, interviewed the defendant and advised him not to plead guilty. Plaintiff similarly interfered with the clients of Mr. Lardner and Mr. Elliott; he advised or induced these defendants to withdraw their pleas without consulting assigned counsel.

ERRORS OF JUDGMENT

Plaintiff's overwhelming desire to protect and defend his assigned clients often led him to exercise poor judgment and to deviate from established standards of conduct. This weakness particularly emerged in his relations with the judges of the District Court.

(a) The Subpoena Incident

In February 1972, plaintiff was assigned to defend Lee Conyers. During the

App. B13

Memorandum of Decision and Order

trial, plaintiff orally applied for the production of certain police records for employment in cross-examination, but the presiding judge denied the request. After the court recessed for the day, plaintiff drafted a subpoena duces tecum for the production of these documents and, the next morning, asked Judge Angelo Mauceri, the Administrative Judge of the District Court, to sign the subpoena. Judge Mauceri declined. Plaintiff then presented the subpoena to Judge Orgera without disclosing that the same application had been denied. Judge Orgera refused to sign because of its overbroad scope. Plaintiff thereafter delivered the unsigned subpoena to Edward Elliott, a fellow staff attorney, and requested that he submit it to Judge Colinari, the judge before whom Mr. Elliott was presently appearing. Judge Colinari signed the subpoena. Again, plaintiff did not inform his colleague or Judge Colinari that both Judge Mauceri and

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Memorandum of Decision and Order

Judge Orgera had previously denied the application.

When Judge Mauceri discovered the procedure employed by plaintiff to obtain the subpoena, he summoned Boyle to his office and suggested that plaintiff should be transferred from the District Court Bureau. Boyle consulted with defendant Middlemiss and both agreed that a transfer of plaintiff would constitute a submission by the Society to the authority of the court in a matter which solely concerned the Society. Shortly thereafter, Judge Mauceri conducted a meeting with Boyle and plaintiff in his chambers. Judge Mauceri expressed the view that plaintiff had violated the Canons of Ethics by not apprising the judges of the prior submissions of the subpoena. However, Judge Mauceri stressed that his purpose was not to hinder plaintiff's proper representation of clients. He advised plaintiff that "(a)s far as your practice, I don't

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want you to limit yourself or your ability to defend the clients the way you see fit. I don't intend to do that but you have to do it within the purview of the rules and regulations of Ethics. Every lawyer is bound by it, not only you but everyone, whether it be a private attorney or one working for the State as you are." (Plaintiff's Exhibit 15, p. 5).

(b) The McElhiney Affirmation

On September 27, 1972, plaintiff moved to dismiss for failure to prosecute People v. McElhiney, a misdemeanor prosecution that had been on the calendar on eight different occasions. Plaintiff filed an affirmation in support of the motion in which he stated that "(t)he sequence of events detailed above might lead an objective observer to conclude that the Court has functioned as an agent of the District Attorney, focusing on the convenience of the prosecution, ignoring the defendant's right to a speedy trial, and endeavoring to

Memorandum of Decision and Order

to assure that a case which the People might lose on trial not be tried." (Plaintiff's Exhibit 1, p. 3). This accusation was obviously aimed at Judge Green who, earlier in the affirmation, was charged by plaintiff with speaking for the office of the District Attorney in offering an explanation for the prosecution's lack of readiness for trial. When Judge Green learned of the affirmation, he summoned plaintiff and Costello to his chambers and instructed plaintiff that, in the future, he should request his disqualification from any case in which plaintiff felt he was biased. Costello reported the incident to defendant Middlemiss.

(c) The Article 78 Proceeding  
against Judge Tisch

This episode involved a case which plaintiff was ready to try but was adjourned upon the request of the District Attorney. When Judge Tisch adjourned the case, he marked

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Memorandum of Decision and Order

the file "No Parts Available". Plaintiff believed that Judge Tisch's inaccurate description was intentional and attempted to bring an Article 78 proceeding to compel the proper notation for the adjournment. Plaintiff traveled to Riverhead to file the proceeding, but defendant Middlemiss interceded and instructed plaintiff not to pursue the matter. Plaintiff not only abandoned his assigned part in the District Court Bureau to file the proceeding, but he also brought it in the wrong court.

INABILITY TO FOLLOW ESTABLISHED RULES

(a) The Pen Incident

On October 12, 1972, plaintiff accompanied a client he was currently defending at trial to the courthouse holding pen. To enable the defendant to take notes for plaintiff's use at summation, plaintiff gave the defendant a ball point pen, notwithstanding previous oral admonishments by the security force personnel not to leave such instruments with detainees.

## Memorandum of Decision and Order

Upon discovery that plaintiff had provided the defendant with the pen, a member of the holding pen security force refused to allow plaintiff to enter the detention area and notified Judge Mauceri of the incident. Judge Mauceri issued an order barring plaintiff from the holding pen; telephoned defendant Middlemiss to inform him of his action; and subsequently sent a formal letter to defendant Middlemiss reciting his decision to bar plaintiff from the holding pen.

(b) The Volz Incident

Assistant District Attorney Volz discovered plaintiff rummaging through files in the Suffolk County District Attorney's Office, which was located in the District Court building, after 5:00 p.m. Volz reported the incident to his supervisor and the latter forbade plaintiff from entering the District Attorney's Office without accompaniment by an Assistant District Attorney.

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(c) Lending of Minutes  
Without Permission

On several occasions, plaintiff, without the requisite approval, loaned minutes of Legal Aid cases which were ordered and paid for by the Society to outsiders.

ABSENCE FROM ASSIGNED PARTS

During the course of his employment with the Society, plaintiff evidenced a strong interest in police brutality cases. Plaintiff often accompanied these defendants to the Suffolk County Human Rights Commission and the Internal Affairs Bureau of the Suffolk County Police Department to assist them in filing formal complaints of police misconduct. Plaintiff also personally argued more writs of habeas corpus than any other staff attorney, which proceedings necessitated frequent trips to the County and Supreme Courts in Riverhead. Although the Society's philosophy was clearly not to restrict plaintiff from pursuing such cases, these pre-occupations disrupted the organization of the

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Society and often shifted plaintiff's workload to the shoulders of his colleagues. For example, Edward Elliott, a staff attorney who was assigned to the arraignment part with plaintiff, was often forced to administer the duties single-handedly because of plaintiff's continuous disappearance. Plaintiff's absence was sorely felt since there were as many as 180 arraignments a day, of which fifty to sixty constituted prisoners who had been transported from the six precincts and from the county jail. It was necessary to interview each prisoner in order to decide whether he or she qualified for Legal Aid. Costello received almost daily complaints concerning plaintiff's absence from assigned parts, including his nonappearance in the courtroom when cases were called. Plaintiff's presence in the arraignment part was so scarce in September 1972 that Costello was forced to reassign him to the identical part in October.

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CONCLUSIONS OF LAW

Jurisdiction: Under Color of State Law

To state a cause of action under §1983, two elements must be proven. First, plaintiff must establish that defendants have acted ". . . under color of any statute, ordinance, regulations, custom, or usage, of any State or Territory. . . ." Or, expressed in its colloquial terms, plaintiff must demonstrate that defendants have acted "under color of state law."<sup>/4</sup> Second, plaintiff must prove that

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<sup>/4</sup> Similarly, plaintiff's claim under the first, sixth and fourteenth amendments requires a showing of state action. The due process clause of the fourteenth amendment provides:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." (emphasis added).

The "under color of state law" requirement of §1983 is synonymous with the "state action" requirement of the fourteenth amendment. United States v. Price, 383 U.S.

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defendants deprived him of a right, privilege or immunity secured by the Constitution and laws of the United States.

The Society is a membership corporation created and organized under Article 2 of the Membership Corporation Law of the State of New York. At all relevant times, it was under contract with the County of Suffolk to provide legal services to indigent criminal defendants in that county pursuant to Article 18-B, §722 of the County Law of New York (McKinney Supp. 1976-77), which requires each county to institute a scheme for providing counsel to indigent persons charged with a crime.<sup>/5</sup> The Criminal

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/4 Cont.

787, 794 n. 7, 86 S. Ct. 1152, 1157 (1966); Perez v. Sugarman, 499 F. 2d 761, 764 (2d Cir. 1974); Shirley v. State Nat. Bank of Connecticut, 493 F. 2d 739, 741 (2d Cir. 1974), cert. denied, 419 U.S. 1009, 95 S. Ct. 329 (1974).

/5 §722 of Article 18-B provides, in pertinent part:

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Division of the Society is funded entirely by the Legislature of Suffolk County.

The Society is governed by a Board of Directors elected by its general membership.<sup>16</sup> At all relevant times, no member of the Board of Directors was a public official, nor

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5 Cont.

The governing body of each county. . . shall place in operation throughout the county. . . a plan for providing counsel to persons charged with a crime. . . who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender....
2. (R)epresentation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operated to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel. . . .
3. Representation by counsel furnished pursuant to a plan of a bar association. . . .

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does any public official become a member of the Society or its Board by virtue of his or her public office. Authority for the hiring and firing of attorneys is vested in the Attorney-in-Charge who, ". . . subject to the control and direction of the Board, shall be responsible for the the Society's legal work. . . and shall have charge and supervision of its offices and branches." (Society's By-Laws, Article VI, §6.1 (Defendant's Exhibit PP, p. 5)).

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5 Cont.

4. Representation according to a plan containing a combination of any of the foregoing. . . .

6 Article IV of the Society's By-Laws provides that "(T)he management of the affairs, property, business and operations of the society is vested in a Board of Directors." (Defendant's Exhibit PP, p. 2).

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The history, constitution and by-laws, and organization of the Society unquestionably establish its status as a private institution. Plaintiff, however, does not dispute the fact that the Society is fundamentally a private entity. Rather, plaintiff asserts two theories commonly applied to private institutions which, he argues, conclusively demonstrate that the Society acted under color of state law: first, that a private entity may act under color of state law by conspiring with state officials to perform an unconstitutional act, Adickes v. S.H. Kress and Company, 398 U.S. 144, 90 S. Ct. 1598 (1970); United States v. Price, 383 U.S. 787, 86 S. Ct. 1152 (1966) and second, that the state and its officers have so extensively involved themselves in the administration of the Society as to render the conduct of the Society state action., Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856 (1961).

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Defendants, on the other hand, contend that Lefcourt v. The Legal Aid Society, 445 F. 2d 1150 (2d Cir. 1971) is dispositive of the state action issue; that there is no substantial state involvement with the Society; and that, in any event, there was no connection between the state activity and the alleged wrongful discharge of plaintiff.

Plaintiff's first theory of state action, based on the doctrine enunciated by the Adickes and Price decisions, must fail. Those cases stand for the proposition that private persons are liable under §1983 where it is shown that they conspired with state officials to deprive a person of federal rights:

Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents. Adickes v. S.H. Kress and Company, *supra* at 152, 90 S. Ct. 1605-6, quoting United States v. Price, *supra* at 794, 86 S. Ct. 1157

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Fundamental to this principle of state action is the involvement of the state official in the proscribed activity; it is his conduct which provides the state action necessary to establish a §1983 claim. Adickes, supra at 152, 90 S. Ct. 1605. Where no cause of action is stated against the government official, the claim against the private person fails as well. Thus, it is well settled that where the state official is immune from suit, private persons cannot be held liable under §1983 because they did not act in conspiracy with a state official against whom a valid claim could be stated. Consequently, the alleged wrongful action was not done under color of state law. Sykes v. State of California Dept. of Motor Vehicles, 497 F. 2d 197, 202 (9th Cir. 1974); Bergman v. Stein, 404 F. Supp. 287, 296 n. 9 (S.D.N.Y. 1975); Stambler v. Dillon, 302 F. Supp. 1250 (S.D. N.Y. 1969).

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In the instant case, plaintiff relies upon the actions of judicial defendants Mauceri and Green to satisfy the requirement of state participation in the prohibited act. However, such reliance is unwarranted since Judge Mauceri and Judge Green did not partake in the decision to discharge plaintiff. In dismissing the complaint against these defendants, Judge Weinstein noted the lack of evidence to support plaintiff's contention that these judges sought, or even desired, plaintiff's dismissal:

No claim ... has been made out sufficient on constitutional grounds to support any judgment against these two judges. All the evidence shows (is) that they complained to Legal Aid about aspects of this plaintiff's work that they didn't care for. In each case the complaint was arguably a justifiable complaint.

It's the duty of judges to observe lawyers before them, bring to the lawyers' attention defects that they see in their work and where they see, to bring it to the attention of the lawyers or if they are lawyers, to the Bar Association or others.

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There isn't the slightest direct evidence that these judges asked for the resignation or firing of this plaintiff or that they desired it. I don't see how there's any basis for liability here in the judges. I don't even reach the question of whether they have a valid defense on the ground that this is part of their judicial duties, just as treating them as normal civilians without consideration for their judicial capacity.

There simply has been no case made out. The only thing we have is the hearsay and surmise of the plaintiff, which certainly doesn't suffice. (Weinstein Transcript, 11/26/76, pp. 267-8).

Hence, the absence of the judges' participation in the alleged unconstitutional act -- the wrongful termination of plaintiff -- is fatal to the claim of state action under the Adickes and Price conspiracy doctrine. Plaintiff has failed to establish a valid claim against the state officials and thereby satisfy the color of state law requirement.<sup>/7</sup>

Plaintiff's second theory of state

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<sup>/7</sup> As noted previously, where the state official is shielded by immunity, the claim against the private person is defeated.

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action, based upon the proposition that "(c)onduct that is formally private may become so entwined with government policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299, 86 S. Ct. 486, 488 (1966), is also deficient. It should be noted at the outset that, under this principle," . . . the question of whether particular discriminatory conduct is private, on the one hand, or amounts to "state action" on the other hand, frequently admits of no easy answer. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 92 S. Ct. 1965, 1971 (1972).

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/7 Cont.

Here, the case is an even stronger one since Judge Weinstein dismissed the complaint against the judicial defendants on the merits.

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It is "(o)nly by sifting facts and weighing circumstances (that) the nonobvious involvement of the State in private conduct can be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722, 81 S. Ct. 856, 860 (1961).

Instrumental to a finding of state action under this doctrine is what is commonly referred to as the "nexus requirement": the state must be involved with the activity that caused the injury. This prerequisite was expressed by the court in Powe v. Miles, 407 F. 2d 73, 81 (2d Cir. 1968):

(T)he state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of complaint.

Accord, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974); Moose Lodge No. 107, supra, at 173, 92 S. Ct.

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1971; Weise v. Syracuse University, 522 F. 2d 397, 405 (2d Cir. 1975).

Plaintiff sets forth the following factors to establish state action: the Criminal Division of the Society receives its funding exclusively from governmental sources; the Society serves a public function by fulfilling the state's constitutional obligation to provide counsel to indigent persons accused of a crime; and, defendant Mauceri, in his capacity as administrative judge of the District Court, assisted the Society in securing funding,<sup>/8</sup> in obtaining the services of a Spanish interpreter, and in decreasing its workload by adjusting the court's assignment policy. These factors share the common fatality of bearing no relationship to the termination of plaintiff. Consequently, the absence of the required

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<sup>/8</sup> In discussing the budget for the District Court during his annual address before the County Legislature in 1971, Judge Mauceri requested funds for the Society.

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"nexus" between the state's involvement and the challenged act negates a finding of state action.

It is well established that the mere receipt of money from the state, without a nexus between the funding and the activity under attack, is insufficient to deem the recipient an agent or instrumentality of the state. Weise, supra at 405; Barrett v. United Hospital, 376 F. Supp. 791, 801-2 (S.D.N.Y. 1974), aff'd, 506 F. 2d 1395 (2d Cir. 1974); Grossner v. Trustees of Columbia University in the City of New York, 287 F. Supp. 535 (S.D.N.Y. 1968). In Lefcourt v. Legal Aid Society, supra, the Court of Appeals for the Second Circuit held that the dismissal of an attorney by his employer, the Legal Aid Society of the City of New York, did not constitute action taken under color of state law. The court concluded that the receipt of government funds by the Society was not decisive of the

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state action issue because Lefcourt failed to demonstrate that the government controlled the Society's employment practices:

Lefcourt has failed to establish that the City or any other governmental subdivision or agency had any right whatever to intervene in any significant way with the affairs of the Society with respect to its employment practices or otherwise. Thus, .... it cannot be said that the Society acts under color of State law by virtue of the financial and other benefits which it receives from the City and various other governmental agencies, courts and subdivisions, since there has been no sufficient showing of governmental control, regulation or interference with the manner in which the Society conducts its affairs (footnote omitted). Id. at 1155.

The argument that the Society's conduct constitutes state action because of the public function which the Society fulfills in providing counsel for indigent criminal defendants as mandated by the sixth amendment was also rejected in the Lefcourt decision. The court noted that the representation of persons accused of crimes is traditionally performed by private individuals and hence does not

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constitute an essential state function:

Activities which are constitutionally essential to the functioning of the judicial process, including the representation of indigent persons accused of criminal activity, are doubtlessly among the most significant functions that any agency, public or private, might be called on to perform. However, the representation of persons accused of crimes, far from being the function of any agency which "traditionally serves the community" is normally performed for and by private persons. . . . The City has sought to have the Society function under similar circumstances. Under the contract, the City retains few controls over the Society, and the Society's obligation under the contract is to its clients and not to the City. Id. at 1156.

Nor were the acts of judicial defendants Mauceri and Green so related to the discharge of plaintiff as to render the conduct of the Society state action. As noted earlier, Judge Weinstein found that neither Judge Mauceri nor Judge Green dictated or requested the termination of plaintiff. Rather, as indicated above, their participation was chiefly confined to criticizing plaintiff for his errors of judgment and his misdeeds, and to reporting

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these incidents to his superiors. Although Judge Mauceri suggested in February 1972 that plaintiff should be transferred, see pp. 9-10 infra, both Boyle and Middlemiss refused to do so. The record reveals that the only substantial connection between the actions of the judicial defendants and plaintiff's discharge was Judge Mauceri's decision to bar plaintiff from the courthouse holding pen. Defendant Middlemiss acknowledged that one of the reasons for plaintiff's removal was that his utility to the Society was diminished by his exclusion from this area.

Certainly, the presence of one link connecting the state activity with the decision to discharge plaintiff is insufficient under the facts of this case to render the Society's conduct attributable to the State. The evidence amply demonstrates that the decision to dismiss plaintiff resulted from the independent determination of the Society and

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and was grounded upon plaintiff's entire course of conduct during the twelve month period of his employment at the District Court Bureau. Plainly stated, the facts of this case do not warrant the finding that ". . . the state action, not the private action, (is). . . the subject of the complaint." Powe v. Miles, supra at 81.<sup>9</sup>

The absence of state action renders it unnecessary to treat plaintiff's claim

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<sup>9</sup> Had plaintiff's claim been one of racial discrimination, the state-private relationship might have triggered a finding of state action. The Second Circuit has traditionally applied different standards of state action to §1983 claims, depending on the offensiveness of the alleged misconduct and the constitutional guarantee in dispute. This principle was recently reaffirmed in Weise, supra at 405:

We must. . . look to the nature of the right infringed as well as the extent of the state's involvement. . . In both Grafton v. Brooklyn Law School and Powe v. Miles, we explicitly noted that our findings of no state action might be different if the cases involved discriminatory

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that the procedural aspects of his dismissal violated the due process clause of the fourteenth amendment.

DEPRIVATION OF CONSTITUTIONAL RIGHTS

Even assuming arguendo that the jurisdictional requisite of action taken under color of state law is present, plaintiff has failed to establish a case on the merits.

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/9 Cont.

admissions policies. Moreover, we have recognized the existence of a "double standard" in state action - "one, a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims," Jackson v. The Statler Foundation. . . (citations and footnote omitted).

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Plaintiff focuses upon three episodes to support the claim that his dismissal was predicated on the exercise of constitutionality protected activity: the McElhiney Affirmation; the subpoena incident; and the pen incident. Each of these events involved plaintiff's role as an advocate of the rights of his clients. The purpose of the subpoena was to obtain records for cross-examination of witnesses who testified against his client; the purpose of the motion to dismiss the McElhiney case for failure to prosecute was to vindicate the right of his client to a speedy trial; and the purpose of providing his client with a pen was to enable the latter to communicate with his attorney and with the court. Therefore, plaintiff argues, by basing his dismissal on these three incidents, plaintiff was unconstitutionally punished for exercising his right of free speech and for exercising the rights of his clients to a fair trial and to adequate legal representation.

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It is well settled that the termination of a public employee may not be grounded upon the exercise of constitutionally protected activity. The Supreme Court reaffirmed this established principle in Perry et al. v. Sindermann, 408 U.S. 593, 597, 92 S. Ct. 2694, 2697 (1972):

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Speiser v. Randall... Such interference with constitutional rights is impermissible. (citations omitted).

Therefore, the primary issue a court must resolve when faced with a claim of unconstitutional dismissal of a public employee

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is whether the termination was based upon conduct that is protected by the Constitution. Perry, supra at 598, 92 S. Ct. 2698. Or, to phrase it in other terms: was the employee discharged for the assigned reasons or did the real motive involve constitutionally protected activity? Shaw v. Board of Trustees of the Frederick Community Hospital, 549 F. 2d 929, 933 (4th Cir. 1976); Hetrick v. Martin, 480 F. 2d 705, 707 (6th Cir. 1973), cert. denied, 414 U.S. 1075, 94 S. Ct. 592 (1973). In order to prevail, the employee must prove that the decision to dismiss was, in fact, made in retaliation for the exercise of his constitutional rights. When a plaintiff has been given full opportunity to establish that the discharge was a reprisal, and he fails in his proof, the discharge must stand. Calo v. Paine, 521 F. 2d 411, 413 (2d Cir. 1975).

This court is convinced that plaintiff's termination was in no manner based

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upon the exercise of his first amendment right of free speech or upon the assertion of the sixth amendment rights of his clients. Plaintiff offers no proof that the Society's actions were motivated by a desire to impede or interfere with his representative duties. At no time during his employment was plaintiff ever instructed how to try a lawsuit or how to defend an indigent client whom he was assigned to represent. Nor was plaintiff ever restricted by his supervisors in the execution of his duty to represent an indigent criminal defendant within the bounds of the law.

Plaintiff's claim, though theoretically correct, is unsupported by the evidence. A study of the record reveals that the decision to discharge plaintiff was not made because he was attempting to obtain evidence useful in cross-examination, or seeking to vindicate his client's right to a speedy trial, or attempting to communicate with a client.

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Rather, these episodes played a part in the decision to terminate plaintiff because they demonstrated his inability to adhere to elementary rules and procedures of the Society and the court. These occurrences, together with many others, compel the finding that plaintiff was removed for his failure to function within the organizational framework of the Society.

Lefcourt v. The Legal Aid Society, 312 F. Supp. 1105 (S.D.N.Y. 1970), aff'd, supra, factually similar to the instant case, is particularly noteworthy. There, a former Legal Aid attorney, Gerald B. Lefcourt, brought an action against the Society under 42 U.S.C. §1983, claiming that his termination was based solely on the exercise of his first amendment rights. Plaintiff contended that he was discharged because of critical statements he had made to fellow attorneys about the Society and because of his role in the

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organization of "The Association of Legal Aid Attorneys." As in the case at bar, the court found that the alleged unconstitutional conduct constituted only one piece of a large puzzle -- the Lefcourt record revealed a history of frictional episodes between Lefcourt and his superiors as well as a failure by Lefcourt to follow the Society's instructions. The court was convinced by the evidence that Lefcourt was not discharged solely for the exercise of his first amendment rights but, like plaintiff herein, was dismissed because his services were not in harmony with the welfare of the Society:

Without questioning the good faith of Lefcourt's efforts to achieve the crucial and important objective of improving the quality of defense of indigents in the courts in which he worked, I find that the Society, also acting in good faith and with equal zeal for the welfare of its clients, discharged plaintiff lawfully. In reaching this determination I have concluded that Lefcourt was discharged as the result of an amalgam of acts of which his statements constituted a

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part, but only a part, and that his total behavior during the course of his employment with the Society was such as to permit the Society to decide in good faith that his service was not in harmony with the welfare of the organization. (footnotes omitted). Lefcourt v. Legal Aid Society et al., 312 F. Supp. 1107.

Plaintiff's reliance on Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 563, 88 S. Ct. 1731 (1968), is misplaced. In fact, Pickering stands for the proposition that in certain circumstances -- which are present in the instant case --- the exercise of constitutional rights may be considered in the termination of employment. In Pickering, a teacher was dismissed for writing and publishing a letter which criticized the School Board's treatment of proposals to raise new revenue for the schools. Illinois courts affirmed Pickering's discharge, but the Supreme Court reversed, holding that the dismissal violated Pickering's first amendment right to free speech. The

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Court refused to adopt a hard and fast rule that public statements by employees may never furnish the grounds for their termination:

At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Id. at 568, 88 S. Ct. 1734 5.

In the course of its opinion, the Court delineated the countervailing interests of the state which, if sufficiently strong, may provide the basis for the dismissal of the employee. For example, where the statements threaten to disrupt harmony among coworkers, to impede the proper performance of the employee's duties, or to interfere with the systematic and orderly operation of the schools, the employee's first amendment rights may be outweighed by

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the interest of the State". . .in promoting the efficiency of the public services it performs through its employees." Id. at 568, 88 S. Ct. 1735.

These factors are unquestionably present in the case at bar. It has previously been shown how plaintiff's conduct interfered with the orderly operation of the Society and impeded the proper performance of plaintiff's duties. Thus, even if his removal were based in part on the exercise of free speech, or the assertion of his clients' sixth amendment rights, such reliance by the Society would be permissible. The Court's elucidation in Chitwood v. Feaster, 468 F. 2d 359, 361 (4th Cir. 1972) of when a teacher's statements cannot shield him from dismissal is particularly apposite to plaintiff's actions:

A college has a right to expect a teacher to follow instructions and to work cooperatively and harmoniously with the head of the Department. If one cannot or does not, if one undertakes

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to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized.

See also Sprague v. Fitzpatrick, 546 F. 2d 560 (3rd Cir. 1976) (Court applied Pickering to sustain the discharge of a First Assistant District Attorney who had accused his superior of not telling the truth); Lefcourt v. The Legal Aid Society, 312 F. Supp. 1111-14 (Court applied Pickering and held that statements by a Legal Aid attorney could form the basis of his dismissal since they had a definite impact on the internal operation of the Society and threatened to disrupt harmony among coworkers).

Plaintiff's claim that he was denied due process because the reasons proffered by defendants for his dismissal were arbitrary and irrational lacks merit. The evidence more than adequately supports defendants'

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contention that plaintiff's termination was based upon his inability to adhere to organizational procedures and to develop amiable working relationships with his colleagues. In Simard v. Board of Education of the Town of Groton, 473 F. 2d 988 (2d Cir. 1973), the court rejected a similar claim by a nontenured teacher whose one year contract was not renewed by the Superintendent of Schools. The Board of Education conducted a hearing to review the Superintendent's decision and, having found that Simard's infractions of the rules and regulations were not conducive to an effective administration of the school system, upheld the dismissal. Simard contended that the reasons proffered for the nonrenewal of his contract were unrelated to the legitimate educational interests of the school and hence denied him due process of law. The court rejected plaintiff's claim and held that the infractions "...are not so minimally related

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to the effective performance of a high school teacher as to be unconstitutionally capricious or arbitrary . . . . A school system may justifiably demand more from its teachers than competent classroom instruction; a chronic refusal to comply with reasonable administrative obligations can surely have a disruptive effect on students, fellow teachers and administrators alike. . . ." Id. at 994-5. As in Simard, plaintiff's infractions of the regulations of the Society and his inability to work with colleagues were not so unrelated to the interests of the Society as to be capricious or irrational.

CLAIM OF RESERVE INSURANCE COMPANY

Plaintiff Reserve Insurance Company ("Reserve") seeks a declaratory judgment stating that it is not contractually bound to defend or indemnify the Society, the defendant Middlemiss or defendant Ralph Costello in the consolidated action decided

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above. Since Graseck has failed to establish a cause of action, the only issue to be resolved is Reserve's obligation to defend. It is the position of Reserve that ". . .the acts complained of in Graseck are not covered under Reserve's policy of liability insurance issued to the National Legal Aid and Defender Association (with subcertificate to Legal Aid Society of Suffolk County, Inc.)" (Reserve Trial Memorandum, p. 1). More specifically, Reserve argues that the policy insures the Society and its members against legal malpractice actions brought by its clients, and not claims, such as Graseck's, which emanate from the termination of an employer-employee relationship. A plain and reasonable reading of the insurance contract, which is unambiguous in its terms, convinces this court that Graseck's action does not fall within the coverage of the policy.

The policy states in pertinent part that:

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This Insurance is to indemnify. . . any claim or claims for breach of professional duty as lawyers which may be made against them. . . by reason of any negligent act, error, or omission. . . in their professional capacity as lawyers acting as legal aid or defenders as defined in Article I of the Bylaws of the National Legal Aid and Defender Association. (emphasis added). (Exhibit A to Reserve's Trial Memorandum, p. 1).

Section 1.2 and 1.3 of Article I of the Society's By-Laws define "legal aid" and "defender" as follows:

- 1.2 The terms "legal aid". . . mean the rendering of legal services in civil matters to persons unable to employ counsel for lack of means, either in the nature of consultation and advice or in the nature of representation in court . . . .
- 1.3 The terms defender. . . mean the rendering of legal services to persons unable to employ counsel for lack of means who are accused of a crime, either in the nature of consultation and advice or in the nature of representation in court.... (Exhibit C to Reserve's Trial Memorandum, p. 5).

Thus, the language of the contract and the terms of the By-Laws which it incorporates

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clearly indicate that the claim must be one for misfeasance or nonfeasance in the rendering of legal services to indigent clients.

The obligation of an insurance company to defend an action brought against the insured by a third party is determined by the allegations of the complaint: if the complaint upon its face alleges facts which fall within the coverage of the policy, the insurer is obligated to assume the defense of the action. Rochester Woodcraft Shop, Inc. v. General Accident Fire and Life Assurance Corp., Ltd., 35 App. Div. 2d 186, 187, 316 N.Y.S. 2d 281, 283 (Fourth Dept. 1970); Gallivan v. Pucello, 68 Misc. 2d 713, 715, 328 N.Y.S. 2d 37, 40 (Sup. Ct. Onondaga County, 1971), aff'd, 40 App. Div. 2d 749, 338 N.Y.S. 2d 411 (Fourth Dept. 1972). The gravamen of Graseck's complaint is that his dismissal was unconstitutionally predicated on the exercise of his first amendment right and the

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sixth amendment rights of his clients. The complaint does not contain factual allegations that the Society, defendant Middlemiss or defendant Costello were negligent while rendering services to indigent clients. The averments that defendants dismissed him (Graseck) "for properly performing his duties as an attorney and specifically asserting his clients' constitutionally protected rights... " and that "by establishing. . .a pattern of judicial interference. . .(defendants) intended to discriminate against. . .plaintiff . . . in prejudice of. . . the rights of indigents represented by Suffolk Legal Aid", (Plaintiff's Complaint dated August 7, 1974, pars. 33, 38), do not, as defendants contend, transform the action into one arising out of the negligent representation of clients. Since Graseck's claim is not embraced by the terms of the policy, Reserve had no obligation to defend the Society, defendant Middlemiss

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and defendant Costello.

CONCLUSION

For the reasons cited above, the complaint in Graseck v. Mauceri (74-C-1157) is dismissed and judgment is granted for defendants Legal Aid Society of Suffolk County, New York and John F. Middlemiss, Jr. In Reserve Company v. Mauceri (74-C-1559), plaintiff is entitled to a declaratory judgment that it is not contractually bound to defend or indemnify the Legal Aid Society of Suffolk County, New York, John F. Middlemiss, Jr. and Ralph Costello.

The Clerk of the Court is directed to enter judgment in accordance with this memorandum of decision and order.

/s/ Jacob Mishler  
U. S. D. J.

App. Cl(a)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of August, one thousand nine hundred and seventy-eight

Present:

HON. WILFRED FEINBERG

HON. WALTER R. MANSFIELD

HON. JAMES L. OAKES  
Circuit Judges

-----X  
ARTHUR V. GASECK, JR.,  
Plaintiff-Appellant,

v.

ANGELO MAUCERI, individually and as Administrative Judge of the District Court of Suffolk County; EDWARD U. GREEN, JR., individually and as Judge of the District Court of Suffolk County; JOHN F. MIDDLEMISS, JR., individually and as Attorney-in-Charge, LEGAL AID SOCIETY OF SUFFOLK COUNTY, NEW YORK; RALPH COSTELLO, individually and as Attorney-in-Charge of the Criminal Division of the Legal Aid Society of Suffolk County, New York; LEGAL AID SOCIETY OF SUFFOLK COUNTY, NEW YORK;

Defendants-Appellees.

77-7572

-----X

App. C1(b)

Appeal from the United States District  
Court for the Eastern District of New York

This cause came on to be heard on the  
transcript of record from the United States  
District Court for the Eastern District of  
New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now  
hereby ordered, adjudged, and decreed that  
the order of said District Court be and it  
hereby is affirmed in accordance with the  
opinion of this court with costs to be taxed  
against the appellant.

A. DANIEL FUSARO,  
Clerk

By /s/ Sara Piovia  
Deputy Clerk

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IN THE  
**Supreme Court of the United States**

December Term, 1978

No. 78-859

Supreme Court, U. S.

**FILED**

**DEC 26 1978**

MICHAEL RODAK, JR., CLERK

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ARTHUR V. GRASECK, JR.,  
*Plaintiff-Petitioner,*  
—against—

ANGELO MAUCERI, Individually and as Administrative Judge of  
the District Court of Suffolk County; EDWARD U. GREEN, JR.,  
Individually and as a Judge of the District Court of Suffolk  
County,

*Defendants,*

JOHN F. MIDDLEMISS, JR., Individually and as Attorney-in-Charge,  
Legal Aid Society of Suffolk County, New York,

*Defendant-Respondent,*

RALPH COSTELLO, Individually and as Attorney-in-Charge of the  
District Court Bureau of the Criminal Division of the Legal  
Aid Society of Suffolk County, New York,

*Defendant,*

LEGAL AID SOCIETY of Suffolk County, New York,

*Defendant-Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

**RESPONDENTS' BRIEF IN OPPOSITION**

---

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IN THE  
**Supreme Court of the United States**

December Term, 1978

No. 78-859

---

ARTHUR V. GRASECK, JR.,

*Plaintiff-Petitioner,*

—against—

ANGELO MAUCERI, Individually and as Administrative  
Judge of the District Court of Suffolk County; EDWARD  
U. GREEN, JR., Individually and as a Judge of the Dis-  
trict Court of Suffolk County,

*Defendants,*

JOHN F. MIDDLEMISS, JR., Individually and as Attorney-in-  
Charge, Legal Aid Society of Suffolk County, New York,

*Defendant-Respondent,*

RALPH COSTELLO, Individually and as Attorney-in-Charge  
of the District Court Bureau of the Criminal Division  
of the Legal Aid Society of Suffolk County, New York,

*Defendant,*

LEGAL AID SOCIETY of Suffolk County, New York,

*Defendant-Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

**RESPONDENTS' BRIEF IN OPPOSITION**

The respondents John F. Middlemiss, Jr., Individually  
and as Attorney-in-Charge, Legal Aid Society of Suffolk

County, New York and the Legal Aid Society of Suffolk County, New York, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Second Circuit's opinion and judgment in this case filed and entered August 1, 1978. That opinion is not reported.

### Questions Presented

1. Whether the concurrent findings of fact by both lower courts should be upheld absent a very obvious and exceptional showing of error?
2. Whether the Respondents acted under the color of State Law pursuant to 42 U.S.C. §1983 and 28 U.S.C. §1343(3) in dismissing petitioner?
3. Whether the holding that the dismissal of petitioner was not under the color of State Law may permit the evasion of the Sixth Amendment duty to provide effective legal representation to the indigent?

### Statement of Facts

Petitioner Graseck (hereinafter "Graseck") worked for the Legal Aid Society (hereinafter "the Society") as a staff attorney in its Criminal Division from July 12, 1971 to October 13, 1972. In October, 1971, he was assigned to the District Court Bureau in Hauppauge, Long Island and remained there until his dismissal on October 13, 1972. E. Thomas Boyle, Attorney-in-Charge of the District Court Bureau from October 1971 to August 1972, served as his immediate supervisor. Ralph Costello replaced Boyle in this position in August, 1972, and was Graseck's supervisor until October 13, 1972.

On October 13, 1972, respondent Middlemiss, Attorney-in-Charge of the Society, met with Costello. Middlemiss requested petitioner to resign, setting forth the grounds for the request. Graseck informed Middlemiss that he refused to resign and that he needed the weekend to consider it. Middlemiss then discharged him.

E. Thomas Boyle met with Middlemiss a few days later protesting Graseck's discharge and urging his reinstatement. When Middlemiss refused to rehire him, Boyle resigned in protest.

On November 15 the Personnel Committee of the Society conducted a hearing to review Graseck's termination, particularly the charge leveled against the Society by him and Boyle that judicial pressure provoked the decision. Graseck was notified of the meeting. The first part of the meeting was open to the public; former clients of Graseck testified on his behalf. The balance of the meeting was held in private among the five members of the Personnel Committee, Boyle, Costello, Middlemiss and Graseck.

In the private meeting the four attorneys presented their positions to the Committee. Graseck presented his and submitted exhibits in support thereof; Boyle spoke on Graseck's behalf. Based upon all the evidence presented, the Committee voted four to one to uphold the decision of defendant Middlemiss to dismiss. Graseck was apprised of the Committee's affirmation on the day of the hearing. On January 24, 1973, the Board of Directors of the Society reviewed the dismissal and sustained the decision of the Personnel Committee. Graseck was not informed of this meeting nor was he present.

At the trial voluminous oral and documentary evidence was presented, including the reasons for the termination.

The incidents which culminated in Graseck's dismissal as found by the Trial Court in his findings of fact, and adopted by the Circuit Court are the following:

- (a) The Mottenburg Incident
- (b) The Kuzmier, Lardner and Elliott Incidents
- (c) The Subpoena Incident
- (d) The McElhiney Affirmation
- (e) The Article 78 Proceeding Against Judge Tisch
- (f) The Pen Incident
- (g) The Volz Incident
- (h) Lending of Minutes Without Permission
- (i) Absence from Assigned Parts
- (Pet. App. B11-B20)\*

---

\* Page references preceded by "Pet. App." refers to the Appendices filed by Graseck in connection with his Petition for a Writ of Certiorari. The letter "A" preceding a page number refers to the opinion below of the United States Court of Appeals for the Second Circuit and the letter "B" preceding a page number refers to the opinion below of the United States District Court per Chief Judge Jacob Mishler.

## REASONS WHY THE WRIT SHOULD BE DENIED

### POINT I

**The concurrent findings of fact of both lower courts that the plaintiff-petitioner was discharged "due to his inability to work with colleagues and to follow established rules, his repeated exercise of poor judgment, and his continual absence from assigned areas" must be upheld by this Court absent a "very obvious and exceptional showing of error".**

In a case such as this where the Court of Appeals has affirmed the findings of fact of the District Court, this Court has long held:

"A court of law, such as this Court, rather than a court for correction of errors in fact finding, cannot undertake to review *concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.*" (citations omitted) (emphasis added). *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

This "two court rule" has recently been reaffirmed by *Berenyi v. Immigration and Naturalization Service*, 385 U.S. 630 (1967); *United States v. Ceccolini*, — U.S. —, 98 S.Ct. 1054, 1058 (1978); and *Memphis Light, Gas & Water Division v. Craft*, — U.S. —, 98 S.Ct. 1554, 1564 (1978). See also, *Goodyear Tire & Rubber Co. v. Ray-O-Vac Co.*, 321 U.S. 275 (1944); *United States v. Commercial Credit Co., Inc.*, 286 U.S. 63, 67 (1932); *United States v. Dickenson*, 331 U.S. 745, 751 (1947); *Faulkner v. Gibbs*, 338 U.S. 267, *rehearing den.* 338 U.S. 896 (1949).

The parties are not in substantial disagreement as to the basic facts surrounding Graseck's discharge. Gra-

seck, however, urges the conclusion that "[t]he chronology of events clearly demonstrates that the discharge decision was a response to extraordinary judicial communication to respondent Society", (Petition at 44)\* and therefore his dismissal resulted "in [an] infringement of petitioner's and his clients' constitutionally protected rights under the First and Sixth Amendments, respectively, and was violative of the due process clause of the Fourteenth Amendment". Petition at 11-12.

After a full de novo trial\*\* the District Court rejected these contentions finding that:

"A careful review of the record discloses that plaintiff was discharged for a manifest inability to function within the organizational framework of the Society. The evidence amply demonstrates that plaintiff was unable to work with colleagues, to adhere to elementary rules and procedures of the Society and the District Court, and to exercise the degree of sound judgment that is necessary when presenting a case before the court. During the twelve month period of his employment . . . plaintiff was unwilling to work as a member of a team, but rather consistently performed according to his personal concept of his position. The incidents which culminated in plaintiff's dismissal might, when viewed singly, seem insignificant; however, when regarded in the aggregate, they unequivocally support the Society's contention that plaintiff's conduct impeded its proper functioning and reflected adversely on its good name." Pet. App. at B19-B20

\* Page references preceded by the word "Petition" refer to Graseck's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

\*\* The transcript of the trial before Judge Weinstein was admitted into evidence in the trial before Chief Judge Mishler.

Holding that "[t]he district court's findings regarding the events underlying the dismissal decision are not clearly erroneous and find support in the record" (Pet. App. at A16), the Court of Appeals stated that:

"The district court found that appellant was discharged due to his inability to work with colleagues and to follow established rules, his repeated exercise of poor judgment, and his continued absence from assigned areas . . . [and] that the discharge, far from being a reaction of judicial pressure resulted from the independent managerial decision of the Society." Pet. App. at A7

In their well reasoned opinions, both lower courts fully reviewed all the relevant and material facts surrounding petitioner's dismissal. Graseck, represented by able counsel before the lower courts, does not allege that he was precluded in fully developing the facts to support his position. Nor does his petition raise any new facts not presented to the trial court. He contends that the lower courts erred in their findings, yet he does not provide a standard by which this Court is to review those concurrent findings. While he disagrees with the conclusions of the lower courts as to the reasons for his discharge, Graseck completely fails to make the "very obvious and exceptional showing of error" which is required if this Court is to distribute the concurrent findings of the lower courts.

## POINT II

**In dismissing Graseck as a Legal Aid attorney, the Legal Aid Society did not act under "Color of State Law" within 42 U.S.C. §1983 and 28 U.S.C. §1343(3).**

In order to state a cause of action under 42 U.S.C. §1983, Graseck must establish first, that the appellees-respondents (hereinafter collectively referred to as "the Society") acted "... under color of any statute, ordinance, regulation, custom, or usage of any State or Territory. . .",\* and second he must prove that the Society deprived him of a right, privilege or immunity secured by the Constitution and laws of the United States.

The Legal Aid Society of Suffolk County, New York is a private membership corporation created and organized under Article 2 of the Membership Corporation Law of the State of New York. The Society is independent of any *de facto* or *de jure* state or local regulatory authority. It is governed by a private Board of Directors elected by the general membership. Article IV of the Society's By-Laws provided that "[t]he management of the affairs, property, business and operation of the society is vested in a Board of Directors". Pet. App. at B24 n. 6.

At all relevant times, no member of the Board of Directors was a public official. No public official automatically becomes a member of the governing Board of Directors by virtue of his or her public office. The Society was under a private contract with the County of Suffolk to represent indigent persons charged with a crime in accordance with the County's obligation pursuant to Article 18-B, §722 of

\* The phrase "state action" is used interchangeably with the phrase "under color of 'state law'". *United States v. Price*, 383 U.S. 787, 794 n. 7 (1966).

the County Law of the State of New York. The contract is renewed annually. The County, if it so desired, could choose not to renew the contract.

The private nature of the Society has clearly been recognized by the New York State legislature in enacting Section 722 of the County Law, which gives the County the option of using either a "*public* defender" system or a "*private* legal aid bureau or society" to represent indigent criminal defendants. (emphasis added). The mere fact that Section 722 of the County Law authorizes the County to employ a "private legal aid bureau or society" to represent indigent criminal defendants does not by any stretch of the imagination transform the Society into a "public" entity, *cf. Buck v. Board of Elections of City of New York*, 536 F.2d 522 (2d Cir. 1976).

Although he does not dispute the private nature of the Society, Graseck urges that relationship between the Society and Suffolk County is such that his dismissal by the Society constitutes an act of the State. In rejecting Graseck's position, both courts below found that his dismissal was, in the words of the Court of Appeals, the result of the Society's "... own independent evaluation of its needs, rather than at the behest of the state judges". Pet. App. at A37 (footnote omitted).

The facts of this case are virtually identical to those in *Lefcourt v. Legal Aid Society*, 445 F.2d 1150 (2d Cir. 1971), which held that the firing of an attorney employed by the Legal Aid Society did not constitute state action under 42 U.S.C. §1983.\* As observed by the Court of Appeals in the instant case,

\* See also, *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973), *cert. den.* 414 U.S. 1135 (1974).

"[t]he similarities between *Lefcourt* and the facts before us are, not surprisingly, striking. The bylaws of both societies are almost identical, . . . their respective contracts were made pursuant to the same New York Law requiring the State to implement a plan for furnishing counsel to indigent defendants, . . . they both receive substantial governmental funding (although the Society in *Lefcourt* evidently received some funds for its criminal division from private sources), they are both housed in governmental buildings, and, *most importantly*, there is no formal mechanism through which any government entity can exercise control or supervision over the internal operations of the societies." (footnote omitted) (emphasis added) Pet. App. at A21-A22. *See also*, Pet. App. at B33-B34, B43-B44.

Graseck ". . . has failed to establish that . . . [Suffolk County] or any other governmental subdivision or agency had any right whatever to intervene in any significant way with the affairs of the Society with respect to its employment practices or otherwise". *Lefcourt, supra*, at 1155.

Attempting to distinguish *Lefcourt, supra*, from the instant case, Graseck states that the Society in *Lefcourt* ". . . received considerable private financing [in the criminal area] and had maintained a healthy private existence long before it sought governmental assistance" compared to the activities of the criminal bureau of the Society in the instant case which was exclusively funded by Suffolk County. Petition at 69-70. This fact and other "minimal courtesies" (Pet. App. at A23 n. 20) cited by Graseck in an attempt to take the instant case out of the *Lefcourt* decision and into the area of state action were considered and, in effect, dismissed by the Court of Appeals as immaterial. Pet. App. at A22-A23.

Graseck further argues that the Court of Appeals erred in refusing to find state action in spite of the existence of a symbiotic relationship which existed between the state and the Society. According to Graseck, the Court of Appeals focused ". . . almost exclusively on the nexus approach to analyzing the state action issue set forth in *Jackson* [*Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)] [and] made only a passing and confusing reference to the *Burton* [*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)] mode of analysis. . . ." Petition at 55.

According to Graseck,

"... a mutually beneficial relationship, such as the one existing between the State and Respondent Society, is the cornerstone of the symbiotic relationship contemplated by *Burton*. The symbiotic nature of their relationship is apparent from the fact that Legal Aid engaged in the constitutionally mandated service of providing legal assistance to indigents and plays a central role in the management of the Court's congested criminal calendar in exchange for exclusive funding of its operation by Suffolk County and the performance of administration favors by the Court." (footnote omitted) Petition at 58-59.

Each of these points was considered by the lower court in arriving at its decision against finding state action.

The Court of Appeals found that a symbiotic relationship, required by *Burton v. Wilmington Parking Authority, supra*, for a finding of state action, did not exist.

"We have held that the relationship between the state and a private authority may be so extensive that the actions of the ostensibly private institution will fall within the ambit of state action, even in the absence of

direct state involvement in the challenged activity [citations omitted]. Not unmindful of the close working relationship here, we believe that the absence of governmental participation, let alone of "substantial" participation, in the Society's general management and internal operations *precludes a finding in this case of the degree of pervasive interdependence or partnership contemplated by Burton.*" (emphasis added) Pet. App. at A28-A29 n.22.

Contrary to Graseck's assertion, the Second Circuit considered and refused to find a symbiotic relationship. Of great, if not singular, importance to the court was the absence of governmental participation in the Society's general management and internal operations. *Compare, Braden v. University of Pittsburgh*, 552 F.2d 948, 960 (3d Cir. 1977); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 877 (5th Cir. 1975), *cert. den.* 423 U.S. 1000 (1975), finding no state action under *Burton* analysis where the board of directors had the ultimate authority in determining hospital policy, notwithstanding a mutually beneficial relationship between the county and the hospital, with *Downs v. Sawtelle*, 574 F.2d, 1, 7 (1st Cir. 1978), *cert. den.* — U.S. —, 99 S.Ct. 278 (1978), relied upon by Graseck (Petition at 57), finding state action under the *Burton* analysis for the purpose of section 1983 in which the court stated: "The most compelling factor is the power of the [Town of] Milo selectmen to appoint the hospital's [entire] board of directors."

The fact that the Society is engaged in providing constitutionally mandated legal services does not mean that it is fulfilling a "public function" so as to require a finding of state action. This "public function" argument was rejected in *Lefcourt v. Legal Aid Society*, 445 F.2d 1150,

*supra*. Traditionally the defense of persons, indigent and as well as the non-indigent, has been provided by private attorneys. As noted by this Court in *Flagg Brothers, Inc. v. Brooks*, — U.S. —, 98 S.Ct. 1729 (1978), a primary feature of the public function doctrine is exclusivity. It cannot be seriously contended that the defense of those accused of crimes has been "traditionally an exclusive public function", *Flagg, supra*, at 1735-36, or that the Society has had some power delegated to it by the State which is "traditionally associated with sovereignty". *Id.* at 1733. *Accord, Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, *supra*. See, *Weise v. Syracuse University*, 522 F.2d 397 (2d Cir. 1975); *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1140 (2d Cir. 1973).

Nor does the fact the Society's criminal division was exclusively funded by public moneys sufficient to require a finding of state action.

The mere receipt of state moneys, without a "nexus" between the funding and the challenged activity has been held to be insufficient to warrant a finding of state action. *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427 (2d Cir.); *Weise v. Syracuse University, supra*; *Barrett v. United Hospital*, 376 F.Supp. 791 (S.D.N.Y. 1974), *aff'd*. 506 F.2d 1395 (2d Cir. 1974); *Grossner v. Trustees of Columbia University*, 287 F.Supp. 535 (S.D.N.Y. 1968); Pet. App. at B33.

Graseck's attempt to distinguish *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, *supra*, on the grounds that in *Lefcourt* the Society received "considerable private financing" (Petition at 70) was considered by the Court of Appeals in arriving at its decision. Pet. App. at A22. There is moreover no evidence in the record that indicates the amount of private financing the Society received in *Lef-*

court or that would sustain Graseck's claim that it was "considerable".

*Braden v. University of Pittsburgh*, 552 F.2d 948, *supra*; *Downs v. Sawtelle*, 574 F.2d 1, *cert. den.* — U.S. —, 99 S.Ct. 278, *supra*; and *Holodnak v. AVCO Corp., AVCO-Lycoming Division, Stratford*, 514 F.2d 285 (2d Cir. 1975), *cert. den.* 423 U.S. 892 (1975), relied upon by Graseck to support a finding of a *Burton*\* symbiotic relationship between the Society and the State are easily distinguishable from the present case.

In *Braden, supra*, the court, in affirming the lower court's denial of defendant's motion to dismiss the complaint, pointed out that the state was deeply enmeshed in the operations of the University, including but not limited to its financing and its basic decision making processes. *Id.* at 959. Prior to the passage of the "University of Pittsburgh-Commonwealth Act", the university had been a private institution. The State, not content with merely providing funds to the ailing institution, required a comprehensive restructuring of the university to reflect the needs of the State. Especially damaging to the defendant university was the fact that the University of Pittsburgh-Commonwealth Act provided that the university was established as an "instrumentality of the Commonwealth to serve as a State-related institution. . . ." *Id.*

\* Although it is undisputed that *Burton* survives *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357, *supra*, the *Burton* court itself, in limiting the ambit of that decision, stated:

" . . . what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Burton v. Wilmington Parking Authority*, 365 U.S. at 726 (1961).

As previously explained, the court in *Downs, supra*, relying almost exclusively upon the fact that the entire board of directors of the hospital was appointed by public officials, found state action with respect to the hospital. By comparison, the board of the Society is elected by the Society's general membership and at no time did any public official serve on the board nor did public officials automatically become members of the board by virtue of their office. *Holodnak, supra*, in which the court, using the *Burton* approach, found state action, involved a privately owned corporate defendant, whose buildings were owned by the federal government and located on government owned land, most of the equipment used was owned by the government, a large proportion of the work performed at the plant was under contract with the government which maintained a substantial task force there to ensure compliance and quality and production control.

The fact is that the Society, as a private entity, is under contract with Suffolk County to perform certain services not traditionally or, prior to the contract, exclusively performed by the State. As in any contractual arrangement, both parties thereto derive mutual benefits. Finding a *Burton* symbiotic relationship here, without more, thereby requiring a finding of state action would in effect require finding virtually every private entity contracting with a state entity subject to state action. This position is not only untenable and undesirable, it goes far beyond the established precedent of this court.

Having failed to find the *Burton* symbolic relationship urged by Graseck, the Court of Appeals proceeded to apply the analysis set forth in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, *supra*, with respect to the

" . . . crucial question [as to] whether the actions of Judges Mauceri and Green, and in particular their

communications with Graseck's supervisors, provided sufficient involvement in the discharge to distinguish *Lefcourt* and render the conduct of the Society that of the State." Pet. App. at A23-A24.

Stressing his characterization of the "virtual monopoly status" the Society has in Suffolk County, as the provider of criminal defense services to the indigent (Petition at 72-73), Graseck, states that "... this Court indicated that a sufficient '... relationship between the challenged actions of the entities involved and their monopoly status...' might render appropriate a finding of state action". (emphasis added) Petition at 74-75. This Court in *Jackson, supra*, said, however, that a *monopoly status is not determinative* of whether the action constitutes state action for the purposes of the Fourteenth Amendment.

"... [T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351.

As the Second Circuit Court of Appeals aptly stated in *Powe v. Miles*, 407 F.2d 73, 81 (2d Cir. 1968),

"... the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint."

Rejecting Graseck's assertion that his discharge was in direct response to judicial pressure imposed on the Society, the Court of Appeals relied on the conclusion of Judge Weinstein who, in dismissing the complaint against the

state judges, "... found totally lacking any evidence that they encouraged or even desired discharge." Pet. App. at A25.

Conceding that the conflicts between Graseck and the judges were among the factors which prompted the Society's decision to discharge Graseck and therefore there was an attenuated casual connection between the judges' conduct and the action taken by the Society, (Pet. App. at A29), the lower court concluded that

"[o]ur review of the three incidents deemed crucial by appellant convinces us that the limited nature of the judges' conduct complained of precludes a finding of state action" *Id.* at A31.

...

"It is not the effect alone that government conduct has on private actions which establishes the governmental character of the private action. Rather it is the degree of government influence and control over the private entity, and in particular over the decision itself that is determinative." (footnote omitted) *Id.* at A34.

...

"In sum, we agree with the district court that the Society initiated the dismissal based on its own independent evaluation of its needs, rather than at the behest of the state judges" (footnote omitted) *Id.* at A37.

Graseck's further contention that the Society's "... virtual exclusive control over the funds for the defense of indigent criminal defendants ... enables it to restrain its staff from engaging in the vigorous representation to which clients are entitled pursuant to the Code of Professional Responsibility and in accordance with the Sixth Amendment" (Petition at 73) finds no basis in the record. No

evidence was offered that the Society restrained its staff from engaging in the vigorous representation of its clients. With respect to Graseck, the District Court found that:

"Plaintiff offers no proof that the Society's actions were motivated by a desire to impede or interfere with his representative duties. At no time during his employment was plaintiff ever instructed how to try a lawsuit or how to defend an indigent client whom he has assigned to represent. Nor was plaintiff ever restricted by his supervisors in the execution of his duty to represent an indigent criminal defendant within the bounds of the law.

Plaintiff's claim, though theoretically correct, is unsupported by the evidence. A study of the record reveals that the decision to discharge plaintiff was not made because he was attempting to obtain evidence useful in cross-examination, or seeking to vindicate his client's right to a speedy trial, or attempting to communicate with a client." Pet. App. at B42.

The flexible approach adopted by the Court of Appeals in state action cases by requiring a higher degree of state involvement in non-race discrimination cases before finding state action than it requires in race discrimination cases is not unique to the Second Circuit. *Jackson v. Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974); *Weise v. Syracuse University*, 522 F.2d 397, 406 (2d Cir. 1975); *Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39 (2d Cir. 1977) *cert. den.* 434 U.S. 845 (1977); *Compare, Coleman v. Wagner College*, 429 F.2d 1120 (2d Cir. 1970); *Powe v. Miles*, 407 F.2d 73, 82-83 (2d Cir. 1968); *Wahba v. New York University*, 492 F.2d 96 (2d Cir. 1974), *cert. den.* 419 U.S. 874 (1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Lefcourt v. Legal Aid Society*, 445 F.2d 1150, 1155 n. 6 (2d Cir. 1971).

*See, Taylor v. Consolidated Edison Co. of New York, Inc.*, *supra* at 43 stating that a lighter burden may also be applicable to sex discrimination cases. For cases in other circuits *see, Granfield v. Catholic University of America*, 530 F.2d 1035, 1046 n. 29 (D.C.C. 1976), *cert. den.* 429 U.S. 821 (1976); *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 879 (5th Cir. 1975), *cert. den.* 423 U.S. 1000 (1975); *Turner v. Impala Motors*, 503 F.2d 607, 611 (6th Cir. 1974); *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 931 (1st Cir. 1974), *cert. den.* 419 U.S. 1001 (1974); *Adams v. Southern California First National Bank*, 492 F.2d 324, 334-35 (9th Cir. 1973), *cert. den.* 419 U.S. 1006 (1974).\*

As the court explained in *Taylor v. Consolidated Edison Co. of New York, Inc.*, 552 F.2d 39, 42, *cert. den.*, 434 U.S. 845 (1977), *supra*,

"[b]ecause of the generally recognized anathematic status of any government-sponsored racial discrimination, for instance, we have held that a lesser degree of state involvement is needed to meet the state action requirement in cases alleging such discrimination. [citations omitted] . . . ."

In explaining the rationale underlying the difference in standards used in state action cases, the court in *Greco v. Orange Memorial Hospital Corp.*, *supra*, stated:

"The doctrine of state action developed primarily in the area of racial discrimination. [citation omitted]

The concepts developed in this area, explicitly sup-

\* Graseck's only cited authority to the contrary is the First Circuit case of *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), *cert. den.*, — U.S. —, 99 S.Ct. 278 (1978), which involved an action against a hospital but did not involve racial discrimination. Finding state action, the court, in dicta, observed that it had in an earlier case expressed *reservations* as to the flexible approach used in the Second Circuit. *Id.* at 6 n. 5.

ported by constitutional and legislative mandates, were necessarily broadly drawn in order to implement Congressional intent in circumstances of positive and frequent state obfuscation and delay. *The potentially explosive impact of the application of state action concepts designed to ferret out racially discriminatory policies in areas unaffected by racial considerations has led the courts to define more precisely the applicability of the state action doctrine.*" (emphasis added).

The Circuit Court approved the District Court's use of the higher standard in the instant case stating that the "... less stringent state action standard utilized in racial discrimination cases is inapplicable here". Pet. App. at A19-A20, n. 17.

Graseck's reliance upon the recent decision in *University of California Regents v. Bakke*, — U.S. —, 98 S. Ct. 2733 (1978), is taken out of context and totally misplaced. *Bakke* involved a "quota" system used by the University which gave admission preference to members of minority groups. It was in that context that the Court's statement, relied upon by Graseck, that "... there are serious problems of justice connected with the idea of preference itself," *Bakke, supra*, at 2752, was made. The preference referred to in *Bakke* dealt with preference in favor of one racial group over another. It did not refer to the standards used in different state action cases.

Although not presented to the Court of Appeals for its consideration, Graseck further urges that even if the higher standard is applied, "... this case does have significant racial implications". Petition at 64. That racial implications may be involved (a suggestion the Society vigorously resists) does not *ipso facto* mean that the standard applied to state action involving racial discrimination has been met.

More importantly for this case, there is absolutely no evidence in the record showing the racial composition of the indigent clients of the Legal Aid Society of Suffolk County who are accused of crimes. Nor did Graseck attempt to introduce such evidence at either trial. His assertion that "[i]t is apparent that racial minorities are over-represented . . . as clients of such free legal assistance programs as that respondent Society contracts to provide . . ." (Petition at 67-68) finds no support in the record. Obviously raised as an afterthought, this claim should be dismissed.

### POINT III

**There is no proof in the record to support a finding that the refusal of the courts below to find that Graseck's dismissal was the result of state action will permit evasion of the Sixth Amendment duty to provide effective legal representation to the indigent.**

Graseck asserts that the refusal of the Court of Appeals to find his dismissal was the result of state action on the part of the Society could seriously undermine the special protection afforded under the Sixth Amendment. By refusing to find that his dismissal was the result of state action will, he asserts, provide a loophole which will make possible evasion of the Sixth Amendment duty to provide effective counsel to indigents. Petition at 75-76.

No proof was offered at either trial to support Graseck's position. And as discussed above, the District Court specifically found that Graseck himself was never restricted by his supervisors in fully and effectively representing the Society's clients within the bounds of the law. Pet. App. at B42. Although the conclusion urged by Graseck is theoretically possible, it is, in this case, purely hypothetical and speculative given the fact that there is nothing in the

record developed before the courts below to support his position even if this court were inclined to consider the issue.\*

The implication of Graseck's position is that any communication by a judge to the supervisors of an attorney responsible for providing counsel to the indigent which reflects adversely upon the attorney will undermine the Sixth Amendment rights of the indigent.\*\* The logical conclusion of this position would preclude a judge from ever commenting upon the performance of attorneys such as those employed by the Society who represent the indigent. Not only would this result, as a matter of policy, be highly undesirable if not absurd, it would directly contradict subsection (B)(3) of Canon 3 of the Code of Judicial Conduct of the American Bar Association adopted August 16, 1972 which provides:

\* Consideration of this issue might well require this Court to consider the standard to be used in determining whether there has been adequate and effective representation by counsel. The standard applied in the Second Circuit is whether the attorney's conduct was "... of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice". *United States v. Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. den.* 338 U.S. 950 (1950). *Accord, United States v. Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974).

\*\* Graseck's position apparently is that attorneys representing the indigent must be completely insulated from the judiciary.

It can be argued that the attorneys employed by the Society are less subject to the influence of the State judiciary than public defenders who are directly employed by the government. *See*, N.Y. County Law §716, authorizing the board of supervisors of a county to designate the public defender. Federal Public Defenders are appointed by the judicial council of the circuit. 18 U.S.C. §3006A(h)(2)(A). *See, United States v. Robinson*, 553 F.2d 429 (5th Cir. 1977), *cert. den.* 434 U.S. 1016 (1977), holding that where defendant had failed to show prejudice, he was not deprived of constitutional right to counsel merely because his attorney was employed by the federal government as a federal public defender. *See also, United States ex rel. Reed v. Richmond*, 277 F.2d 702 (2d Cir. 1960); *Espinoza v. Rogers*, 470 F.2d 1174 (10th Cir. 1972).

"A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

*Commentary:* Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body."

As stated by Judge Weinstein in the first trial of this action,

"[i]t's the duty of judges to observe lawyers before them, bring to the lawyers' attention defects that they see in their work and where they see, to bring it to the attention of the lawyers or if they are lawyers, to the Bar Association or others." Pet. App. B28.

This is much too difficult and important an issue to decide in the abstract based upon hypothetical speculation. Even if this Court were to take it under consideration, there is nothing in the record from which even an inference could be drawn to support the finding urged by Graseck.

**CONCLUSION**

**For all of the foregoing reasons the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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